# UNITED STATES REPORTS

## VOLUME 529

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1999

FEBRUARY 29 THROUGH MAY 25, 2000

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FRANK D. WAGNER
REPORTER OF DECISIONS

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

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WILLIAM H. REHNQUIST, CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.

RETIRED

BYRON R. WHITE, ASSOCIATE JUSTICE.

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OFFICERS OF THE COURT

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# SUPREME COURT OF THE UNITED STATES

## ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

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(For next previous allotment, and modifications, see 502 U. S., p. VI, 509 U. S., p. V, and 512 U. S., p. V.)

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 1999

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## SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ILLINOIS COUNCIL ON LONG TERM CARE, INC.

### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 98–1109. Argued November 8, 1999—Decided February 29, 2000

Under the Medicare Act's special review provisions, a nursing home that is "dissatisfied . . . with *a determination described in subsection (b)(2)*" is "entitled to a hearing . . . to the same extent as is provided in" the Social Security Act, 42 U. S. C. § 405(b), "and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) . . . ." 42 U. S. C. § 1395cc(h)(1) (emphasis added). The cross-referenced subsection (b)(2) gives petitioner Secretary of Health and Human Services (HHS) power to terminate a provider agreement with a home where, for example, she determines that a home has failed to comply substantially with the statute and the regulations. The cross-referenced § 405(b) describes the administrative hearing to which a "dissatisfied" home is entitled, and the cross-referenced § 405(g) provides that the home may obtain federal district court review of the Secretary's "final decision . . . made after a hearing . . . ." Section 405(h), a provision of the Social Security Act incorporated into the Medicare Act by 42 U. S. C. § 1395ii, provides that "[n]o action . . . to recover on any claim arising under" the Medicare laws shall be "brought under [28 U. S. C. § ]1331." It channels most, if not all, Medicare claims through this special review system. Respondent, the Illinois Council on Long Term Care, Inc. (Council), an association of nursing homes, did not rely on these provisions when it filed suit against, *inter alios*, petitioners (hereinafter Secretary), challenging the validity of Medicare regulations that impose sanctions or remedies on nursing homes that violate certain substantive standards. Rather, it invoked federal-question jurisdiction, 28 U. S. C. § 1331. In dismissing for lack of jurisdiction, the Federal District Court found that 42 U. S. C. § 405(h), as interpreted in *Weinberger* v. *Salfi*, 422 U. S. 749, and *Heckler* v. *Ringer*, 466 U. S. 602, barred a § 1331 suit. The Seventh Circuit reversed, holding that *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, had significantly modified such earlier case law.

*Held:* Section 405(h), as incorporated by § 1395ii, bars federal-question jurisdiction here. Pp. 10–25.

(a) Section 405(h) purports to make exclusive § 405(g)'s judicial review method. While its "to recover on any claim arising under" language plainly bars § 1331 review where an individual challenges on any legal ground the agency's denial of a monetary benefit under the Social Security and Medicare Acts, the question here is whether an anticipatory challenge to the lawfulness of a policy, regulation, or statute that might later bar recovery or authorize imposition of a penalty is also an action "to recover on any claim arising under" those Acts. P. 10.

(b) Were the Court not to take account of *Michigan Academy*, § 405(h), as interpreted in *Salfi* and *Ringer*, would clearly bar this § 1331 lawsuit. The Court found in the latter cases that § 405(h) applies where "both the standing and the substantive basis for the presentation" of a claim is the Social Security Act, *Salfi*, *supra*, at 760–761, or the Medicare Act, *Ringer*, 466 U. S., at 615. All aspects of a present or future benefits claim must be channeled through the administrative process. *Id.*, at 621–622. As so interpreted, § 405(h)'s bar reaches beyond ordinary administrative law principles of "ripeness" and "exhaustion of administrative remedies"—doctrines that normally require channeling a legal challenge through the agency—by preventing the application of exceptions to those doctrines. This nearly absolute channeling requirement assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by individual courts applying "ripeness" and "exhaustion" exceptions case by case. The assurance comes at the price of occasional individual, delay-related hardship, but paying such a price in the context of a massive, complex health and safety program such as Medicare was justified in the judgment of Congress as understood in *Salfi* and *Ringer*. *Salfi* and *Ringer* cannot be distinguished from the instant case. They themselves foreclose distinctions based upon the "potential future" versus "actual present" nature of the claim, the "general legal" versus the "fact-specific" nature of the challenge, the "collateral" versus the "noncollateral" nature of the issues, or the "declaratory" versus "injunctive" nature of the relief sought. Nor can the Court accept a distinction that limits § 405(h)'s scope to claims for monetary benefits or that involve "amounts," as neither the language nor the purposes of § 405 support such a distinction. Neither *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, nor *Mathews* v. *Eldridge*, 424 U. S. 319, supports the Council's effort to distinguish *Salfi* and *Ringer*. The Court's approval of a § 1331 suit against the Immigration and Naturalization Service in *McNary* rested on the different language of the immigration statute. And *Eldridge* was a case in which the respondent had complied with, not disregarded, the Social Security Act's special review procedures—specifically the nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court. The upshot is that the Council's argument must rest primarily upon *Michigan Academy*. Pp. 11–15.

(c) *Michigan Academy* did not, contrary to the Court of Appeals' holding, modify the Court's earlier holdings by limiting § 405(h)'s scope, as incorporated by § 1395ii, to "amount determinations." That case involved the lawfulness of HHS regulations governing procedures used to calculate Medicare Part B benefits; and the Medicare statute, as it then existed, did not provide for § 405(g) review of such decisions. The Court ruled that this silence did not itself foreclose § 1331 review. In response to the argument that § 405(h) barred § 1331 review, the Court declined to pass in the abstract on the meaning of § 405(h) because that section was made applicable to the Medicare Act "to the same extent as" it is applicable to the Social Security Act by virtue of 42 U. S. C. § 1395ii. The Court interpreted that phrase to foreclose application of § 405(h) where its application would preclude judicial review rather than channel it through the agency. As limited by the Court of Appeals, *Michigan Academy* would have overturned or dramatically limited earlier precedents such as *Salfi* and *Ringer*, and would have created a hardly justifiable distinction between "amount determinations" and many similar HHS determinations. This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*, and it did not do so here. Pp. 15–20.

(d) The Council's argument that it falls within the *Michigan Academy* exception because it can obtain no review at all unless it can obtain § 1331 review is unconvincing. It argues that review is available only after the Secretary terminates a home's provider agreement. But in her brief and regulations, the Secretary offers a legally permissible interpretation of the statute: that it permits a dissatisfied nursing home to have an administrative hearing on a determination that it has failed to comply substantially with the statute, agreements, or regulations, whether termination or some other remedy is imposed. See, *e. g., Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843. The Secretary also denies that she engages in any practice that forces a home to submit a corrective plan and sacrifice appeal rights in order to avoid termination, or that penalizes more severely a home that chooses to appeal. Because the Council offers no convincing reason to doubt her description of the agency's practice, the Court need not decide whether a practice that forced homes to abandon legitimate challenges could amount to the practical equivalent of a total denial of judicial review. If, as the Council argues, the regulations unlawfully limit the extent to which the agency will provide the administrative review channel leading to judicial review, its members remain free, after following the special review route, to contest in court the lawfulness of the relevant regulation or statute. That is true even if the agency does not or cannot resolve the particular contention, because it is the "action" arising under the Medicare Act that must be channeled through the agency. The Council finally argues that, as an association speaking on behalf of its injured members, it has no standing to take advantage of the special review channel. However, it is the members' rights to review that are at stake, and the statutes creating the special review channel adequately protect those rights. Pp. 20–24.

143 F. 3d 1072, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., *post,* p. 30, and SCALIA, J., *post,* p. 31, filed dissenting opinions. THOMAS, J., filed a dissenting opinion, in which STEVENS and KENNEDY, JJ., joined, and in which SCALIA, J., joined except as to Part III, *post,* p. 32.

*Jeffrey A. Lamken* argued the cause for petitioners. With him on the briefs were *Solicitor General Waxman, Acting Assistant Attorney General Ogden, Deputy Solicitor General Kneedler, Barbara C. Biddle, Jeffrey Clair, Harriet S. Rabb,* and *Jeffrey Golland.*

*Kimball R. Anderson* argued the cause for respondent. With him on the brief were *Charles P. Sheets*, *Bruce R. Braun*, and *Brian E. Neuffer.*[*]

JUSTICE BREYER delivered the opinion of the Court.

The question before us is one of jurisdiction. An association of nursing homes sued, *inter alios*, the Secretary of Health and Human Services (HHS) and another federal party (hereinafter Secretary) in Federal District Court claiming that certain Medicare-related regulations violated various statutes and the Constitution. The association invoked the court's federal-question jurisdiction, 28 U. S. C. § 1331. The District Court dismissed the suit on the ground that it lacked jurisdiction. It believed that a set of special statutory provisions creates a separate, virtually exclusive, system of administrative and judicial review for denials of Medicare claims; and it held that one of those provisions explicitly barred a § 1331 suit. See 42 U. S. C. § 1395ii (incorporating into the Medicare Act 42 U. S. C. § 405(h), which provides that "[n]o action . . . to recover on any claim" arising under the Medicare laws shall be "brought under section 1331 . . . of title 28"). The Court of Appeals, however, reversed.

We conclude that the statutory provision at issue, § 405(h), as incorporated by § 1395ii, bars federal-question jurisdiction here. The association or its members must proceed instead through the special review channel that the Medicare statutes create. See 42 U. S. C. §§ 1395cc(h), (b)(2)(A), 1395ii; §§ 405(b), (g), (h).

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[*] Briefs of *amici curiae* urging affirmance were filed for the American Association of Homes and Services for the Aging by *Mark H. Gallant;* for the American Health Care Association et al. by *Thomas C. Fox* and *Harvey M. Tettlebaum;* for the American Hospital Association by *Charles G. Curtis, Jr.*, and *Edward J. Green;* and for the American Medical Association et al. by *Paul M. Smith, Robert M. Portman, Michael L. Ile, Leonard A. Nelson, Richard N. Peterson, Ann E. Allen, Stuart M. Gerson, Saul J. Morse,* and *Robert J. Kane.*

## I

### A

We begin by describing the regulations that the association's lawsuit attacks. Medicare Act Part A provides payment to nursing homes which provide care to Medicare beneficiaries after a stay in a hospital. To receive payment, a home must enter into a provider agreement with the Secretary of HHS, and it must comply with numerous statutory and regulatory requirements. State and federal agencies enforce those requirements through inspections. Inspectors report violations, called "deficiencies." And "deficiencies" lead to the imposition of sanctions or "remedies." See generally §§ 1395i–3, 1395cc.

The regulations at issue focus on the imposition of sanctions or remedies. They were promulgated in 1994, 59 Fed. Reg. 56116, pursuant to a 1987 law that tightened the substantive standards that Medicare (and Medicaid) imposed upon nursing homes and that significantly broadened the Secretary's authority to impose remedies upon violators. Omnibus Budget Reconciliation Act of 1987, §§ 4201–4218, 101 Stat. 1330–160 to 1330–221 (codified as amended at 42 U. S. C. § 1395i–3 (1994 ed. and Supp. III)).

The remedial regulations (and a related manual) in effect tell Medicare-administering agencies how to impose remedies after inspectors find that a nursing home has violated substantive standards. They divide a nursing home's deficiencies into three categories of seriousness depending upon a deficiency's severity, its prevalence at the home, its relation with other deficiencies, and the home's compliance history. Within each category they list a set of remedies that the agency may, or must, impose. Where, for example, deficiencies "immediately jeopardize the health or safety of . . . residents," the Secretary must terminate the home's provider agreement or appoint new, temporary management. Where deficiencies are less serious, the Secretary may impose lesser remedies, such as civil penalties, transfer of residents, denial of some or all payment, state monitoring, and the like. Where a nursing home, though deficient in some respects, is in "[s]ubstantial compliance," *i. e.*, where its deficiencies do no more than create a "potential for [causing] minimal harm," the Secretary will impose no sanction or remedy at all. See generally 42 U. S. C. § 1395i–3(h); 42 CFR § 488.301 (1998); § 488.400 *et seq.;* App. 54, 66 (Manual). The statute and regulations also create various review procedures. 42 U. S. C. §§ 1395cc(b)(2)(A), (h); 42 CFR § 431.151 *et seq.* (1998); § 488.408(g); 42 CFR pt. 498 (1998).

The association's complaint filed in Federal District Court attacked the regulations as unlawful in four basic ways. In its view: (1) certain terms, *e. g.*, "substantial compliance" and "minimal harm," are unconstitutionally vague; (2) the regulations and manual, particularly as implemented, violate statutory requirements seeking enforcement consistency, 42 U. S. C. § 1395i–3(g)(2)(D), and exceed the legislative mandate of the Medicare Act; (3) the regulations create administrative procedures inconsistent with the Federal Constitution's Due Process Clause; and (4) the manual and other agency publications create legislative rules that were not promulgated consistent with the Administrative Procedure Act's demands for "notice and comment" and a statement of "basis and purpose," 5 U. S. C. § 553. See App. 18–19, 27–38, 43–49 (Amended Complaint).

## B

We next describe the two competing jurisdictional routes through which the association arguably might seek to mount its legal attack. The route it has followed, federal-question jurisdiction, is set forth in 28 U. S. C. § 1331, which simply states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The route that it did not follow, the special Medicare review route, is set forth in a complex set of statutory provisions, which must be read together. See Appendix, *infra.* The Medicare Act says that a home

> "dissatisfied . . . with *a determination described in subsection (b)(2)* . . . shall be entitled to a hearing . . . to the same extent as is provided in [the Social Security Act, 42 U. S. C. § ]405(b) . . . and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) . . . ." 42 U. S. C. § 1395cc(h)(1) (emphasis added).

The cross-referenced subsection (b)(2) gives the Secretary power to terminate an agreement where, for example, the Secretary

> "*has determined* that the provider fails to comply substantially with the provisions [of the Medicare Act] and regulations thereunder . . . ." § 1395cc(b)(2)(A) (emphasis added).

The cross-referenced § 405(b) describes the nature of the administrative hearing to which the Medicare Act entitles a home that is "dissatisfied" with the Secretary's "determination." The cross-referenced § 405(g) provides that a "dissatisfied" home may obtain judicial review in federal district court of "any final decision of the [Secretary] made after a hearing . . . ." Separate statutes provide for administrative and judicial review of civil monetary penalty assessments. § 1395i–3(h)(2)(B)(ii); §§ 1320a–7a(c)(2), (e).

A related Social Security Act provision, § 405(h), channels most, if not all, Medicare claims through this special review system. It says:

> "(h) Finality of [Secretary's] decision.
>
> "The findings and decision of the [Secretary] after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein pro-

> vided. *No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under section 1331 or 1346 [federal defendant jurisdiction] of title 28 to recover on any claim arising under this subchapter.*" (Emphasis added.)

Section 1395ii makes § 405(h) applicable to the Medicare Act "to the same extent as" it applies to the Social Security Act.

### C

The case before us began when the Illinois Council on Long Term Care, Inc. (Council), an association of about 200 Illinois nursing homes participating in the Medicare (or Medicaid) program, filed the complaint we have described, *supra,* at 7, in Federal District Court. (Medicaid is not at issue in this Court.) The District Court, as we have said, dismissed the complaint for lack of federal-question jurisdiction. No. 96 C 2953 (ND Ill., Mar. 31, 1997), App. to Pet. for Cert. 13a, 15a. In doing so, the court relied upon § 405(h) as interpreted by this Court in *Weinberger* v. *Salfi,* 422 U. S. 749 (1975), and *Heckler* v. *Ringer,* 466 U. S. 602 (1984). App. to Pet. for Cert. 15a–19a.

The Court of Appeals reversed the dismissal. 143 F. 3d 1072 (CA7 1998). In its view, a later case, *Bowen* v. *Michigan Academy of Family Physicians,* 476 U. S. 667 (1986), had significantly modified this Court's earlier case law. Other Circuits have understood *Michigan Academy* differently. See *Michigan Assn. of Homes and Servs. for the Aging* v. *Shalala,* 127 F. 3d 496, 500–501 (CA6 1997); *American Academy of Dermatology* v. *HHS,* 118 F. 3d 1495, 1499–1501 (CA11 1997); *St. Francis Medical Center* v. *Shalala,* 32 F. 3d 805, 812–813 (CA3 1994), cert. denied, 514 U. S. 1016 (1995); *Farkas* v. *Blue Cross & Blue Shield,* 24 F. 3d 853, 855–860 (CA6 1994); *Abbey* v. *Sullivan,* 978 F. 2d 37, 41–44 (CA2 1992); *National Kidney Patients Assn.* v. *Sullivan,* 958 F. 2d 1127, 1130–1134 (CADC 1992), cert. denied, 506 U. S. 1049 (1993). We granted certiorari to resolve those differences.

## II

Section 405(h) purports to make exclusive the judicial review method set forth in § 405(g). Its second sentence says that "[n]o findings of fact or decision of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided." § 405(h). Its third sentence, directly at issue here, says that "[n]o action against the United States, the [Secretary], or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 *to recover on any claim arising under this subchapter.*" (Emphasis added.)

The scope of the italicized language "to recover on any claim arising under" the Social Security (or, as incorporated through § 1395ii, the Medicare) Act is, if read alone, uncertain. Those words clearly apply in a typical Social Security or Medicare benefits case, where an individual seeks a monetary benefit from the agency (say, a disability payment, or payment for some medical procedure), the agency denies the benefit, and the individual challenges the lawfulness of that denial. The statute plainly bars § 1331 review in such a case, irrespective of whether the individual challenges the agency's denial on evidentiary, rule-related, statutory, constitutional, or other legal grounds. But does the statute's bar apply when one who *might* later seek money or some other benefit from (or contest the imposition of a penalty by) the agency challenges in advance (in a § 1331 action) the lawfulness of a policy, regulation, or statute that *might* later bar recovery of that benefit (or authorize the imposition of the penalty)? Suppose, as here, a group of such individuals, needing advance knowledge for planning purposes, together bring a § 1331 action challenging such a rule or regulation on general legal grounds. Is such an action one "to recover on any claim arising under" the Social Security or Medicare Acts? That, in effect, is the question before us.

## III

In answering the question, we temporarily put the case on which the Court of Appeals relied, *Michigan Academy, supra,* to the side. Were we not to take account of that case, § 405(h) as interpreted by the Court's earlier cases of *Weinberger* v. *Salfi, supra,* and *Heckler* v. *Ringer, supra,* would clearly bar this § 1331 lawsuit.

In *Salfi,* a mother and a daughter, filing on behalf of themselves and a class of individuals, brought a § 1331 action challenging the constitutionality of a statutory provision that, if valid, would deny them Social Security benefits. See 42 U. S. C. §§ 416(c)(5), (e)(2) (imposing a duration-of-relationship Social Security eligibility requirement for surviving wives and stepchildren of deceased wage earners). The mother and daughter had appeared before the agency but had not completed its processes. The class presumably included some who had, and some who had not, appeared before the agency; the complaint did not say. This Court held that § 405(h) barred § 1331 jurisdiction for all members of the class because "it is the Social Security Act which provides both the standing and the substantive basis for the presentation of th[e] constitutional contentions." *Salfi, supra,* at 760–761. The Court added that the bar applies "irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions." 422 U. S., at 762. It also pointed out that the bar did not "preclude constitutional challenges," but simply "require[d] that they be brought" under the same "jurisdictional grants" and "in conformity with the same standards" applicable "to nonconstitutional claims arising under the Act." *Ibid.*

We concede that the Court also pointed to certain special features of the case not present here. The plaintiff class had asked for relief that included a direction to the Secretary to pay Social Security benefits to those entitled to them but for the challenged provision. See *id.*, at 761. And the Court thought this fact helped make clear that the action arose "under the Act whose benefits [were] sought." *Ibid.* But in a later case, *Ringer*, the Court reached a similar result despite the absence of any request for such relief. See 466 U. S., at 616, 623.

In *Ringer*, four individuals brought a § 1331 action challenging the lawfulness (under statutes and the Constitution) of the agency's determination not to provide Medicare Part A reimbursement to those who had undergone a particular medical operation. The Court held that § 405(h) barred § 1331 jurisdiction over the action, even though the challenge was in part to the agency's procedures, the relief requested amounted simply to a declaration of invalidity (not an order requiring payment), and one plaintiff had as yet no valid claim for reimbursement because he had not even undergone the operation and would likely never do so unless a court set aside as unlawful the challenged agency "no reimbursement" determination. See *id.*, at 614–616, 621–623. The Court reiterated that § 405(h) applies where "both the standing and the substantive basis for the presentation" of a claim is the Medicare Act, *id.*, at 615 (quoting *Salfi*, 422 U. S., at 760–761) (internal quotation marks omitted), adding that a "claim for future benefits" is a § 405(h) "claim," 466 U. S., at 621–622, and that "all aspects" of any such present or future claim must be "channeled" through the administrative process, *id.*, at 614. See also *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U. S. 449, 456 (1999); *Califano* v. *Sanders*, 430 U. S. 99, 103–104, n. 3 (1977).

As so interpreted, the bar of § 405(h) reaches beyond ordinary administrative law principles of "ripeness" and "exhaustion of administrative remedies," see *Salfi*, *supra*, at 757—doctrines that in any event normally require channeling a legal challenge through the agency. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148–149 (1967) (ripeness); *McKart* v. *United States*, 395 U. S. 185, 193–196 (1969) (exhaustion). Indeed, in this very case, the Seventh Circuit held that several of respondent's claims were not ripe and remanded for ripeness review of the remainder. 143 F. 3d, at 1077–1078. Doctrines of "ripeness" and "exhaustion" contain exceptions, however, which exceptions permit early review when, for example, the legal question is "fit" for resolution and delay means hardship, see *Abbott Laboratories*, *supra*, at 148–149, or when exhaustion would prove "futile," see *McCarthy* v. *Madigan*, 503 U. S. 140, 147–148 (1992); *McKart*, *supra*, at 197–201. (And sometimes Congress expressly authorizes preenforcement review, though not here. See, *e. g.*, 15 U. S. C. §2618(a)(1)(A) (Toxic Substances Control Act).)

Insofar as §405(h) prevents application of the "ripeness" and "exhaustion" exceptions, *i. e.*, insofar as it demands the "channeling" of virtually all legal attacks through the agency, it assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts applying "ripeness" and "exhaustion" exceptions case by case. But this assurance comes at a price, namely, occasional individual, delay-related hardship. In the context of a massive, complex health and safety program such as Medicare, embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations, any of which may become the subject of a legal challenge in any of several different courts, paying this price may seem justified. In any event, such was the judgment of Congress as understood in *Salfi* and *Ringer*. See *Ringer*, *supra*, at 627; *Salfi*, *supra*, at 762.

Despite the urging of the Council and supporting *amici*, we cannot distinguish *Salfi* and *Ringer* from the case before us. Those cases themselves foreclose distinctions based upon the "potential future" versus the "actual present" nature of the claim, the "general legal" versus the "fact-specific" nature of the challenge, the "collateral" versus "noncollateral" nature of the issues, or the "declaratory" versus "injunctive" nature of the relief sought. Nor can we accept a distinction that limits the scope of § 405(h) to claims for monetary benefits. Claims for money, claims for other benefits, claims of program eligibility, and claims that contest a sanction or remedy may all similarly rest upon individual fact-related circumstances, may all similarly dispute agency policy determinations, or may all similarly involve the application, interpretation, or constitutionality of interrelated regulations or statutory provisions. There is no reason to distinguish among them in terms of the language or in terms of the purposes of § 405(h). Section 1395ii's blanket incorporation of that provision into the Medicare Act as a whole certainly contains no such distinction. Nor for similar reasons can we here limit those provisions to claims that involve "amounts."

The Council cites two other cases in support of its efforts to distinguish *Salfi* and *Ringer: McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991), and *Mathews* v. *Eldridge,* 424 U. S. 319 (1976). In *Haitian Refugee Center,* the Court held permissible a § 1331 challenge to "a group of decisions or a practice or procedure employed in making decisions" despite an immigration statute that barred § 1331 challenges to any Immigration and Naturalization Service "'determination respecting an application for adjustment of status'" under the Special Agricultural Workers' program. 498 U. S., at 491–498. *Haitian Refugee Center*'s outcome, however, turned on the different language of that different statute. Indeed, the Court suggested that statutory language similar to the language at issue here—any claim "arising under" the Medicare or Social Security Acts, § 405(h)—would have led it to a different legal conclusion. See *id.,* at 494 (using as an example a statute precluding review of "'all causes . . . arising under any of'" the immigration statutes).

In *Eldridge,* the Court held permissible a District Court lawsuit challenging the constitutionality of agency procedures authorizing termination of Social Security disability payments without a pretermination hearing. See 424 U. S., at 326–332. *Eldridge,* however, is a case in which the Court found that the respondent *had followed* the special review procedures set forth in § 405(g), thereby *complying with,* rather than *disregarding,* the strictures of § 405(h). See *id.,* at 326–327 (holding jurisdiction available only under § 405(g)). The Court characterized the constitutional issue the respondent raised as "collateral" to his claim for benefits, but it did so as a basis for requiring the agency to excuse, where the agency would not do so on its own, see *Salfi,* 422 U. S., at 766–767, some (but not all) of the procedural steps set forth in § 405(g). 424 U. S., at 329–332 (identifying collateral nature of the claim and irreparable injury as reasons to excuse § 405(g)'s exhaustion requirements); see also *Bowen* v. *City of New York,* 476 U. S. 467, 483–485 (1986) (noting that *Eldridge* factors are not to be mechanically applied). The Court nonetheless held that § 405(g) contains the nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court. See *Ringer, supra,* at 622; *Eldridge, supra,* at 329; *Salfi, supra,* at 763–764. The Council has not done so here, and thus cannot establish jurisdiction under § 405(g).

The upshot is that without *Michigan Academy* the Council cannot win. Its precedent-based argument must rest primarily upon that case.

## IV

The Court of Appeals held that *Michigan Academy* modified the Court's earlier holdings by limiting the scope of "[§]1395ii and therefore § 405(h)" to "amount determinations." 143 F. 3d, at 1075–1076. But we do not agree. *Michigan Academy* involved a § 1331 suit challenging the lawfulness of HHS regulations that governed procedures used to calculate benefits under Medicare Part B—which Part provides voluntary supplementary medical insurance, *e. g.,* for doctors' fees. See 476 U. S., at 674–675; *United*

*States* v. *Erika, Inc.*, 456 U. S. 201, 202–203 (1982). The Medicare statute, as it then existed, provided for only limited review of Part B decisions. It allowed the equivalent of § 405(g) review for "eligibility" determinations. See 42 U. S. C. § 1395ff(b)(1)(B) (1982 ed.). It required private insurance carriers (administering the Part B program) to provide a "fair hearing" for disputes about Part B "amount determinations." § 1395u(b)(3)(C). But that was all.

*Michigan Academy* first discussed the statute's total silence about review of "challenges mounted against the *method* by which . . . amounts are to be determined." 476 U. S., at 675. It held that this silence meant that, although review was not available *under § 405(g)*, the silence did not itself foreclose other forms of review, say, review in a court action brought under § 1331. See *id.*, at 674–678. Cf. *Erika, supra*, at 208 (holding that the Medicare Part B statute's *explicit* reference to carrier hearings for amount disputes does foreclose *all* further agency or court review of "amount determinations").

The Court then asked whether § 405(h) barred 28 U. S. C. § 1331 review of challenges to methodology. Noting the Secretary's *Salfi/Ringer*-based argument that § 405(h) barred § 1331 review of *all* challenges arising under the Medicare Act and the respondents' counterargument that § 405(h) barred challenges to "methods" only where § 405(g) review was available, see *Michigan Academy*, 476 U. S., at 679, the Court wrote:

> "Whichever may be the better reading of *Salfi* and *Ringer*, we need not pass on the meaning of § 405(h) in the abstract to resolve this case. Section 405(h) does not apply on its own terms to Part B of the Medicare program, but is instead incorporated *mutatis mutandis* by § 1395ii. The legislative history of both the statute establishing the Medicare program and the 1972 amendments thereto provides specific evidence of Congress' intent to foreclose review only of 'amount determina-

> tions'—*i. e.,* those [matters] . . . remitted finally and exclusively to adjudication by private insurance carriers in a 'fair hearing.' By the same token, matters which Congress did *not* delegate to private carriers, such as challenges to the validity of the Secretary's instructions and regulations, are cognizable in courts of law." *Id.*, at 680 (footnote omitted).

The Court's words do not limit the scope of § 405(h) itself to instances where a plaintiff, invoking § 1331, seeks review of an "amount determination." Rather, the Court said that it would "*not* pass on the meaning of § 405(h) in the abstract." *Ibid.* (emphasis added). Instead it focused upon the Medicare Act's cross-referencing provision, § 1395ii, which makes § 405(h) applicable "*to the same extent as*" it is "applicable" to the Social Security Act. (Emphasis added.) It interpreted that phrase as applying § 405(h) "*mutatis mutandis,*" *i. e.,* "[a]ll necessary changes having been made." Black's Law Dictionary 1039 (7th ed. 1999). And it applied § 1395ii with one important change of detail—a change produced by *not* applying § 405(h) where its application to a particular category of cases, such as Medicare Part B "methodology" challenges, would not lead to a channeling of review through the agency, but would mean no review at all. The Court added that a " 'serious constitutional question' . . . would arise if we construed § 1395ii to deny a judicial forum for constitutional claims arising under Part B." 476 U. S., at 681, n. 12 (quoting *Salfi,* 422 U. S., at 762 (citing *Johnson* v. *Robison,* 415 U. S. 361, 366–367 (1974))).

More than that: Were the Court of Appeals correct in believing that *Michigan Academy* limited the scope of § 405(h) itself to "amount determinations," that case would have significantly affected not only Medicare Part B cases but cases arising under the Social Security Act and Medicare Part A as well. It accordingly would have overturned or dramatically limited this Court's earlier precedents, such as *Salfi* and *Ringer,* which involved, respectively, those programs.

It would, moreover, have created a hardly justifiable distinction between "amount determinations" and many other similar HHS determinations, see *supra*, at 14. And we do not understand why Congress, as JUSTICE STEVENS believes, *post*, at 30–31 (dissenting opinion), would have wanted to compel Medicare patients, but not Medicare providers, to channel their claims through the agency. Cf. Brief for Respondent 7–8, 18–21, 30–31 (apparently conceding the point). This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*. And we agree with those Circuits that have held the Court did not do so in this instance. See *Michigan Assn. of Homes and Servs.*, 127 F. 3d, at 500–501; *American Academy of Dermatology*, 118 F. 3d, at 1499–1501; *St. Francis Medical Center*, 32 F. 3d, at 812; *Farkas*, 24 F. 3d, at 855–861; *Abbey*, 978 F. 2d, at 41–44; *National Kidney Patients Assn.*, 958 F. 2d, at 1130–1134.

JUSTICE THOMAS maintains that *Michigan Academy* "must have established," by way of a new interpretation of § 1395ii, the critical distinction between a dispute about an agency determination in a particular case and a more general dispute about, for example, the agency's authority to promulgate a set of regulations, *i. e.*, the very distinction that this Court's earlier cases deny. *Post*, at 38 (dissenting opinion). He says that, in this respect, we have mistaken *Michigan Academy*'s "reasoning" (the presumption against preclusion of judicial review) for its "holding." *Post*, at 39–40. And, he finds the holding consistent with earlier cases such as *Ringer* because, he says, in *Ringer* everyone simply assumed without argument that § 1395ii's channeling provision fully incorporated the whole of § 405(h). *Post*, at 40–42.

For one thing, the language to which JUSTICE THOMAS points simply says that "Congres[s] inten[ded] to foreclose review only of 'amount determinations'" and not "matters which Congress did *not delegate to private carriers, such as* challenges to the validity of the Secretary's instructions and regulations," *Michigan Academy*, *supra*, at 680 (emphasis added). That language refers to particular features of the Medicare Part B program—"private carriers" and "amount determinations"—which are not here before us. And its reference to "foreclosure" of review quite obviously cannot be taken to refer to § 1395ii because, as we have explained, § 1395ii is a channeling requirement, not a foreclosure provision—of "amount determinations" or anything else. In short, it is difficult to reconcile JUSTICE THOMAS' characterization of *Michigan Academy* as a holding that *§ 1395ii* is "trigger[ed]" only by "challenges to . . . particular determinations," *post,* at 40, with the *Michigan Academy* language to which he points.

Regardless, it is more plausible to read *Michigan Academy* as *holding* that § 1395ii does not apply § 405(h) where application of § 405(h) would not simply channel review through the agency, but would mean no review at all. And contrary to JUSTICE SCALIA's suggestion, *post,* at 31–32 (dissenting opinion), that single rule applies to Medicare Part A as much as to Medicare Part B. This latter holding, as we have said, has the virtues of consistency with *Michigan Academy's* actual language; consistency with the holdings of earlier cases such as *Ringer;* and consistency with the distinction that this Court has often drawn between a total preclusion of review and postponement of review. See, *e. g., Salfi, supra,* at 762 (distinguishing § 405(h)'s channeling requirement from the complete preclusion of judicial review at issue in *Robison, supra,* at 373); *Thunder Basin Coal Co.* v. *Reich,* 510 U. S. 200, 207, n. 8 (1994) (strong presumption against preclusion of review is not implicated by provision postponing review); *Haitian Refugee Center,* 498 U. S., at 496–499 (distinguishing between *Ringer* and *Michigan Academy* and finding the case governed by the latter because the statute precluded all meaningful judicial review). JUSTICE THOMAS refers to an "antichanneling" presumption (a "presumption in favor of preenforcement review," *post,* at 46–47). But any such presumption must be far weaker than a presumption against preclusion of all review in light of the traditional ripeness doctrine, which often requires initial presentation of a claim to an agency. As we have said, *supra*, at 13, Congress may well have concluded that a universal obligation to present a legal claim first to HHS, though postponing review in some cases, would produce speedier, as well as better, review overall. And this Court crossed the relevant bridge long ago when it held that Congress, in both the Social Security Act and the Medicare Act, insisted upon an initial presentation of the matter to the agency. *Ringer*, 466 U. S., at 627; *Salfi*, 422 U. S., at 762. *Michigan Academy* does not require that we reconsider that longstanding interpretation.

## V

The Council argues that in any event it falls within the exception that *Michigan Academy* creates, for here as there, it can obtain no review at all unless it can obtain judicial review in a § 1331 action. In other words, the Council contends that application of § 1395ii's channeling provision to the portion of the Medicare statute and the Medicare regulations at issue in this case will amount to the "practical equivalent of a total denial of judicial review." *Haitian Refugee Center, supra*, at 497. The Council, however, has not convinced us that is so.

The Council says that the special review channel that the Medicare statutes create applies only where the Secretary *terminates* a home's provider agreement; it is not available in the more usual case involving imposition of a lesser remedy, say, the transfer of patients, the withholding of payments, or the imposition of a civil monetary penalty.

We have set forth the relevant provisions, *supra*, at 8–9; Appendix, *infra*. The specific judicial review provision, § 405(g), authorizes judicial review of "any final decision of the [Secretary] made after a [§ 405(b)] hearing." A further relevant provision, § 1395cc(h)(1), authorizes a § 405(b) hearing whenever a home is "dissatisfied . . . with a *determi-*

*nation described* in subsection (b)(2)." (Emphasis added.) And subsection (b)(2) authorizes the Secretary to terminate an agreement, whenever she "*has determined* that the provider fails to comply substantially with" statutes, agreements, or "regulations." § 1395cc(b)(2)(A) (emphasis added).

The Secretary states in her brief that the relevant "determination" that entitles a "dissatisfied" home to review is any determination that a provider has failed to comply substantially with the statute, agreements, or regulations, whether termination or "*some other remedy* is imposed." Reply Brief for Petitioners 14 (emphasis added). The Secretary's regulations make clear that she so interprets the statute. See 42 CFR §§ 498.3(b)(12), 498.1(a)–(b) (1998). The statute's language, though not free of ambiguity, bears that interpretation. And we are aware of no convincing countervailing argument. We conclude that the Secretary's interpretation is legally permissible. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984); *Your Home Visiting Nurse Services*, 525 U. S., at 453; see also 42 U. S. C. § 1395i–3(h)(2)(B)(ii) (providing a different channel for administrative and judicial review of decisions imposing civil monetary penalties.)

The Council next argues that the regulations, as implemented by the enforcement agencies, deny review in practice by (1) insisting that a nursing home with deficiencies present a corrective plan, (2) imposing no further sanction or remedy if it does so, but (3) threatening termination if it does not. See 42 CFR §§ 488.402(d), 488.456(b)(ii) (1998). Because a home cannot risk termination, the Council adds, it must always submit a plan, thereby avoiding imposition of a remedy, but simultaneously losing its opportunity to contest the lawfulness of any remedy-related rules or regulations. See § 498.3(b)(12). And, the Council's *amici* assert, compliance actually harms the home by subjecting it to increased sanctions later on by virtue of the unreviewed deficiency findings, and because the agency makes deficiency findings public on the Internet, § 488.325.

The short, conclusive answer to these contentions is that the Secretary denies any such practice. She states in her brief that a nursing home with deficiencies can test the lawfulness of her regulations simply by refusing to submit a plan and incurring a minor penalty. Minor penalties, she says, are the norm, for "terminations from the program are rare and generally reserved for the most egregious recidivist institutions." Reply Brief for Petitioners 18; *ibid.* (HHS reports that only 25 out of more than 13,000 nursing homes were terminated in 1995–1996). She adds that the "remedy imposed on a facility that fails to submit a plan of correction or to correct a deficiency—and appeals the deficiency—is no different than the remedy the Secretary ordinarily would impose in the first instance." *Ibid.* Nor do the regulations "cause providers to suffer more severe penalties in later enforcement actions based on findings that are unreviewable." *Ibid.* The Secretary concedes that a home's deficiencies are posted on the Internet, but she notes that a home can post a reply. See *id.*, at 20, n. 20.

The Council gives us no convincing reason to doubt the Secretary's description of the agency's general practice. We therefore need not decide whether a general agency practice that forced nursing homes to abandon legitimate challenges to agency regulations could amount to the "practical equivalent of a total denial of judicial review," *Haitian Refugee Center*, 498 U. S., at 497. Contrary to what JUSTICE THOMAS says, *post*, at 42–43, 51–52, we do not hold that an individual party could circumvent § 1395ii's channeling requirement simply because that party shows that postponement would mean added inconvenience or cost in an isolated, particular case. Rather, the question is whether, as applied generally to those covered by a particular statutory provision, hardship likely found in many cases turns what appears to be simply a channeling requirement into *complete* preclusion of judicial review. See *Haitian Refugee Center, supra,* at 496–497. Of course, individual hardship may be mitigated in a different way, namely, through excusing a number of the steps in the agency process, though not the step of presentment of the matter to the agency. See *supra,* at 14–15; *infra,* at 24. But again, the Council has not shown anything other than potentially isolated instances of the inconveniences sometimes associated with the postponement of judicial review.

The Council complains that a host of procedural regulations unlawfully limit the extent to which the agency itself will provide the administrative review channel leading to judicial review, for example, regulations insulating from review decisions about a home's level of noncompliance or a determination to impose one, rather than another, penalty. See 42 CFR §§431.153(b), 488.408(g)(2), 498.3(d)(10)(ii) (1998). The Council's members remain free, however, after following the special review route that the statutes prescribe, to contest in court the lawfulness of any regulation or statute upon which an agency determination depends. The fact that the agency might not provide a hearing for that *particular contention,* or may lack the power to provide one, see *Sanders,* 430 U. S., at 109 ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . ."); *Salfi,* 422 U. S., at 764; Brief for Petitioners 45, is beside the point because it is the "action" arising under the Medicare Act that must be channeled through the agency. See *Salfi, supra,* at 762. After the action has been so channeled, the court will consider the contention when it later reviews the action. And a court reviewing an agency determination under §405(g) has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide, see *Thunder Basin Coal,* 510

U. S., at 215, and n. 20; *Haitian Refugee Center, supra,* at 494; *Ringer,* 466 U. S., at 617; *Salfi, supra,* at 762, including, where necessary, the authority to develop an evidentiary record.

Proceeding through the agency in this way provides the agency the opportunity to reconsider its policies, interpretations, and regulations in light of those challenges. Nor need it waste time, for the agency can waive many of the procedural steps set forth in § 405(g), see *Salfi, supra,* at 767, and a court can deem them waived in certain circumstances, see *Eldridge,* 424 U. S., at 330–331, even though the agency technically holds no "hearing" on the claim. See *Salfi, supra,* at 763–767 (holding that Secretary's decision not to challenge the sufficiency of the appellees' exhaustion was in effect a determination that the agency had rendered a "final decision" within the meaning of § 405(g)); *Eldridge, supra,* at 331–332, and n. 11 (invoking practical conception of finality to conclude that collateral nature of claim and potential irreparable injury from delayed review satisfy the "final decision" requirement of § 405(g)). At a minimum, however, the matter must be presented to the agency prior to review in a federal court. This the Council has not done.

Finally, the Council argues that, because it is an association, not an individual, it cannot take advantage of the special review channel, for the statute authorizes review through that channel only at the request of a "dissatisfied" "institution or agency." 42 U. S. C. § 1395cc(h)(1). The Council speaks only on behalf of its member institutions, and thus has standing only because of the injury those members allegedly suffer. See *Arizonans for Official English* v. *Arizona,* 520 U. S. 43, 65–66 (1997); *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U. S. 333, 343 (1977). It is essentially their rights to review that are at stake. And the statutes that create the special review channel adequately protect those rights.

## VI

For these reasons, this case cannot fit within *Michigan Academy*'s exception. The bar of § 405(h) applies. The judgment of the Court of Appeals is

*Reversed.*

## APPENDIX TO OPINION OF THE COURT

42 U. S. C. § 1395cc(h)(1) provides:

> "(h) Dissatisfaction with determination of Secretary; appeal by institutions or agencies; single notice and hearing
>
> "(1) Except as provided in paragraph (2), an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and in applying section 405(*l*) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively."

42 U. S. C. § 1395cc(b) provides, in relevant part:

> "(b) Termination or nonrenewal of agreements
>
> . . . . .
>
> "(2) The Secretary may refuse to enter into an agreement under this section or, upon such reasonable notice to the provider and the public as may be specified in regulations, may refuse to renew or may terminate such an agreement after the Secretary—

> "(A) has determined that the provider fails to comply substantially with the provisions of the agreement, with the provisions of this subchapter and regulations thereunder, or with a corrective action required under section 1395ww(f)(2)(B) of this title."

42 U. S. C. § 405(b) provides, in relevant part:

> "(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations; subsequent applications
>
> "(1) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of

such decision is received by the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

. . . . .

"(3)(A) A failure to timely request review of an initial adverse determination with respect to an application for any benefit under this subchapter or an adverse determination on reconsideration of such an initial determination shall not serve as a basis for denial of a subsequent application for any benefit under this subchapter if the applicant demonstrates that the applicant, or any other individual referred to in paragraph (1), failed to so request such a review acting in good faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination, provided by any officer or employee of the Social Security Administration or any State agency acting under section 421 of this title.

"(B) In any notice of an adverse determination with respect to which a review may be requested under paragraph (1), the Commissioner of Social Security shall describe in clear and specific language the effect on possible entitlement to benefits under this subchapter of choosing to reapply in lieu of requesting review of the determination."

42 U. S. C. § 405(g) provides:

"(g) Judicial review

"Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office."

42 U. S. C. § 405(h) provides:

"(h) Finality of Commissioner's decision

"The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

> No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter."

42 U. S. C. § 1395ii provides:

> "The provisions of sections 406 and 416(j) of this title, and of subsections (a), (d), (e), (h), (i), (j), (k), and (*l*) of section 405 of this title, shall also apply with respect to this subchapter to the same extent as they are applicable with respect to subchapter II of this chapter, except that, in applying such provisions with respect to this subchapter, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively."

28 U. S. C. § 1331 provides:

> "Federal question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

JUSTICE STEVENS, dissenting.

While I join JUSTICE THOMAS' lucid dissent without qualification, I think it worthwhile to identify a significant distinction between cases like *Weinberger* v. *Salfi,* 422 U. S. 749 (1975), and *Heckler* v. *Ringer,* 466 U. S. 602 (1984), on the one hand, and cases like *Bowen* v. *Michigan Academy of Family Physicians,* 476 U. S. 667 (1986), and this case, on the other hand. In the former group, the issue concerned the plaintiffs' entitlement to benefits; in the latter two, the issue concerns providers' eligibility for reimbursement. The distinction between those two types of issues mirrors a critical distinction between the Social Security Act, 42 U. S. C. § 405, and the Medicare Act, 42 U. S. C. § 1395ii.

Disputed claims for Social Security benefits always present a simple two-party dispute in which the claimant is seeking a monetary benefit from the Government. A proceeding under § 405 is correctly described as an action "to recover on any claim arising under this subchapter." § 405(h). Disputed claims under the Medicare Act, however, typically involve three parties—the patient, the provider, and the Secretary. When the issue involves a dispute over the patient's entitlement to benefits, it is fairly characterized as an action "to recover" on a claim that is parallel to a claim for Social Security benefits. The language in § 1395ii that makes § 405(h) applicable to the Medicare Act "to the same extent as" it applies to the Social Security Act thus encompasses claims by patients, but does not necessarily encompass providers' challenges to the Secretary's regulations.

In *Ringer*, the Court, in effect (and, in my view, erroneously), treated the patients' claim as a premature action "to recover" benefits that was subject to the strictures in § 405(h). See 466 U. S., at 620. But in this case, as in *Michigan Academy*, the plaintiffs are providers, not patients. Their challenges to the Secretary's regulations simply do not fall within the "to recover" language of § 405(h) that was obviously drafted to describe pecuniary claims. The incorporation of that language into the Medicare Act via § 1395ii provides no textual support for the Court's decision today. Moreover, contrary to the Court's "Pandora's box" rhetoric, *ante*, at 17–18, adherence to the plain meaning of "to recover" would not make it necessary for the Court to revisit any of its earlier cases. For this reason, as well as the reasons set forth by JUSTICE THOMAS, I find nothing in the relevant statutory text that should be construed to bar this action.

JUSTICE SCALIA, dissenting.

I join the opinion of JUSTICE THOMAS except for Part III, and think it necessary to add a few words in explanation of that vote: I am doubtful whether *Bowen* v. *Michigan Academy of Family Physicians,* 476 U. S. 667 (1986), was correctly decided, but that case being on the books, and involving as it does a question of statutory interpretation, I believe it requires affirmance here. There is in my view neither any basis for holding that 42 U. S. C. § 1395ii has a different meaning with regard to Part A than with regard to Part B, nor (since repeals by implication are disfavored) any basis for holding that the subsequent addition of a judicial-review provision distantly related to § 1395ii altered the meaning we had authoritatively pronounced. See *post,* at 38, n. 7 (THOMAS, J., dissenting).

I do not join Part III of JUSTICE THOMAS's opinion because its reliance upon what it calls the presumption of preenforcement review suggests that *Michigan Academy* was *(a fortiori)* correctly decided. I might have thought, as an original matter, that the categorical language of §§ 1395ii and 405(h) overcame even what JUSTICE THOMAS acknowledges is the *stronger* presumption of *some* judicial review. See *post,* at 45. With regard to the timing of review, I would not even use the word "presumption" (a term which *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967), applies only to the preference for judicial review at *some* point, see *id.,* at 140), since that suggests that some unusually clear statement is required by way of negation. In my view, preenforcement review is better described as the background rule, which can be displaced by any reasonable implication ("persuasive reason to believe," as *Abbott Laboratories* put it, *ibid.*) from the statute.

JUSTICE THOMAS, with whom JUSTICE STEVENS and JUSTICE KENNEDY join, and with whom JUSTICE SCALIA joins except as to Part III, dissenting.

Unlike the majority, I take no position on how 42 U. S. C. § 405(h) applies to respondent's suit. That section is beside the point in this case because it does not apply of its own force to the Medicare Act, but only by virtue of 42 U. S. C. § 1395ii, the Medicare Act's incorporating reference to § 405(h).[1] I read *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667 (1986), to hold that this incorporating reference is triggered when a particular fact-bound determination is in dispute, but not in the case, as here, of a "challeng[e] to the validity of the Secretary's instructions and regulations." *Id.*, at 680. Though this (or any) interpretation of § 1395ii is not entirely free from doubt in light of the arguable tension between *Michigan Academy* and our earlier decision in *Heckler* v. *Ringer*, 466 U. S. 602 (1984), I would resolve such doubt by following our longstanding presumption in favor of preenforcement judicial review. Accordingly, I would hold that § 405(h) does not apply to respondent's challenge, and therefore does not preclude respondent from bringing suit under general federal-question jurisdiction, 28 U. S. C. § 1331.

## I

### A

*Michigan Academy* was the first time we discussed the meaning of § 1395ii. In earlier Medicare Act cases where the plaintiffs had sought to proceed under general federal-question jurisdiction, we either had no need to address § 1395ii, or assumed in passing (and without discussion) that § 1395ii *always* incorporates § 405(h).

Our decision in *United States* v. *Erika, Inc.*, 456 U. S. 201 (1982), involved the former situation. We dealt there with a Part B dispute over the appropriate amount of reimbursement for certain medical supplies.[2] The statute provided for the determination of benefit amounts to be made by a private insurance carrier designated by the Secretary, and authorized *de novo* review of the initial determination by another officer designated by the carrier. *Id.*, at 203 (citing 42 U. S. C. § 1395u (1982 ed.)). But the statutory scheme did not mention the possibility of judicial review of Part B benefit amount determinations, much less review by the Secretary. By contrast, the statute did expressly provide for administrative review by the Secretary and judicial review in two instances: disputes concerning the claimant's eligibility for benefits under Part A or Part B, and disputes over benefit amount determinations *under Part A.* 456 U. S., at 207 (citing 42 U. S. C. § 1395ff (1982 ed.)). We found this contrast illuminating: "In the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose further review of [Part B benefit amount determinations]." 456 U. S., at 208.[3] The inference was strong enough that we had no need to discuss the Government's alternative contention that § 405(h) expressly precluded a claim under general jurisdictional provisions. See *id.*, at 206, n. 6. We therefore had no occasion to decide whether § 1395ii even incorporates § 405(h) into the Medicare Act. (So too in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), we did not need to interpret § 1395ii, but for a different and more obvious reason: *Salfi* was a Social Security case, not a Medicare case, so § 405(h) was directly applicable.)

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[1] Section 1395ii provides in relevant part that the provisions of § 405(h) "shall also apply with respect to [the Medicare Act] to the same extent as they are applicable with respect to [the Social Security Act]."

[2] Part B of the Medicare Act provides voluntary supplemental insurance coverage to eligible individuals for certain physician charges and medical services that are not covered by Part A. Individuals' Part B benefits

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claims are routinely assigned to providers of services, who then seek reimbursement.

[3] Our decision in *Erika* illustrates the longstanding principle that a statute whose provisions are finely wrought may support the preclusion of judicial review, even though that preclusion is only by negative implication. See, *e. g., United States* v. *Fausto*, 484 U. S. 439, 452 (1988); *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 351 (1984); *Switchmen* v. *National Mediation Bd.*, 320 U. S. 297, 305–306 (1943).

Our opinion in *Ringer* was equally silent on the meaning of § 1395ii, this time assuming in passing that it operates as a garden variety incorporating reference of § 405(h),[4] an assumption shared by the parties to the case, see Brief for Petitioners 18, 22, and Brief for Respondents 26–29, in *Heckler* v. *Ringer*, O. T. 1983, No. 82–1772. *Ringer* involved a dispute over reimbursement for a surgical procedure under Part A of the Act, see 466 U. S., at 608–609, n. 4, so, unlike in *Erika* (which involved Part B), it was clear that the individual plaintiffs could seek judicial review under § 1395ff (via § 405(g)) after they had presented a claim for benefits to the Secretary and suffered an unfavorable final decision. But the plaintiffs chose not to follow this route to review. Instead, they attempted to challenge the Secretary's policy prohibiting reimbursement for the surgery as violating constitutional due process and several statutory provisions, invoking general federal-question jurisdiction.[5] As noted, we assumed that § 1395ii incorporates § 405(h) in the situation of a preenforcement challenge to the Secretary's Medicare Act regulations and policies, and held that § 405(h)'s third sentence—"No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter"—expressly precluded Ringer's suit. *Ringer*, 466 U. S., at 615–616.

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[4] See *Heckler* v. *Ringer*, 466 U. S. 602, 614–615 (1984) ("The third sentence of 42 U. S. C. § 405(h), made applicable to the Medicare Act by 42 U. S. C. § 1395ii, provides that § 405(g), to the exclusion of 28 U. S. C. § 1331, is the sole avenue for judicial review for all 'claim[s] arising under' the Medicare Act" (alteration in original)).

[5] The plaintiffs also asserted, to no avail, that the District Court had jurisdiction under 28 U. S. C. § 1361 (mandamus) and 42 U. S. C. § 1395ff (1982 ed. and Supp. II) (judicial review of Part A benefit amount determinations). See *Ringer*, *supra*, at 617–618.

### B

We squarely addressed § 1395ii for the first time in our 1986 decision in *Bowen* v. *Michigan Academy of Family Physicians,* 476 U. S. 667. The Secretary had adopted a regulation that authorized the payment of Part B benefits in different amounts for similar physicians' services. An association of family physicians and several individual doctors filed suit to challenge this regulation. *Id.,* at 668. These plaintiffs asserted no concrete claim to Part B benefits, for judicial review of such a claim was clearly foreclosed by the statute as interpreted in *Erika;* they instead invoked federal-question jurisdiction. Our unanimous opinion[6] in their favor began by rejecting the Secretary's contention that the provisions construed in *Erika* impliedly precluded review not only of benefit amount determinations under Part B, but also of challenges against the Secretary's methodologies for determining such amounts. 476 U. S., at 673. The "precisely drawn" provisions on which we had focused in *Erika* did not support the Secretary's proposed inference, as they "simply d[id] not speak to challenges mounted against the *method* by which such amounts are to be determined." 476 U. S., at 675.

We then turned to the Secretary's argument that § 405(h), incorporated by § 1395ii into the Medicare Act, *expressly* precludes a claimant from resorting to general federal-question jurisdiction under 28 U. S. C. § 1331. The Secretary contended that under *Salfi, supra,* at 756–762, and *Ringer, supra,* at 614–616, "the third sentence of § 405(h) by its terms prevents any resort to the grant of general federal-question jurisdiction contained in 28 U. S. C. § 1331." 476 U. S., at 679. The plaintiffs responded that § 405(h)'s third sentence precludes use of § 1331 only when Congress has provided specific procedures for judicial review of final agency action. *Ibid.* We declined, however, to enter that debate:

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[6] Then-JUSTICE REHNQUIST did not participate.

> "Whichever may be the better reading of *Salfi* and *Ringer*, we need not pass on the meaning of § 405(h) in the abstract to resolve this case. Section 405(h) does not apply on its own terms to Part B of the Medicare program, but is instead incorporated *mutatis mutandis* by § 1395ii. The legislative history of both the statute establishing the Medicare program and the 1972 amendments thereto provides specific evidence of Congress' intent to foreclose review only of 'amount determinations'—*i. e.*, those 'quite minor matters,' 118 Cong. Rec. 33992 (1972) (remarks of Sen. Bennett), remitted finally and exclusively to adjudication by private insurance carriers in a 'fair hearing.' By the same token, matters which Congress did *not* delegate to private carriers, such as challenges to the validity of the Secretary's instructions and regulations, are cognizable in courts of law. In the face of this persuasive evidence of legislative intent, we will not indulge the Government's assumption that Congress contemplated review by carriers of 'trivial' monetary claims, *ibid.*, but intended no review at all of substantial statutory and constitutional challenges to the Secretary's administration of Part B of the Medicare program." *Id.*, at 680 (footnotes omitted).

We accordingly held that the physicians' challenge to the Secretary's regulation could proceed under general federal-question jurisdiction.

### C

In light of the quoted passage, it is beyond dispute that our holding in *Michigan Academy* rested squarely on the meaning of § 1395ii. Accord, *ante*, at 17. Under *Michigan Academy*, a case involving an "amount determinatio[n]" would trigger § 1395ii's incorporation of § 405(h), and thus bar federal-question jurisdiction; a "challeng[e] to the validity of the Secretary's instructions and regulations" would not. 476 U. S., at 680.

This dichotomy does not translate exactly to the instant case, the majority tells us, because the Secretary's determination to terminate a nursing home's provider agreement, see 42 U. S. C. § 1395cc(b) (1994 ed. and Supp. III), in no sense resembles the determination of an "amount" of an individual's benefits under Part A or B, see § 1395ff. Therefore, the majority concludes, *Michigan Academy*'s interpretation of § 1395ii simply does not bear on respondent's challenge to the Secretary's regulations here. See *ante,* at 20.

But § 1395ii applies to more than just § 1395ff, the provision concerning benefit amounts; it applies, rather, to the entire Medicare Act, including § 1395cc, the provision concerning provider agreements that *is* directly at issue here. And we have "stron[g] cause to construe a *single* formulation . . . the same way each time it is called into play." *Ratzlaf* v. *United States,* 510 U. S. 135, 143 (1994). Accordingly, the interpretation of § 1395ii that we announced in *Michigan Academy* must have a more general import than a distinction between Part B benefits determinations, on the one hand, and Part B methods guiding such determinations, on the other. *Michigan Academy* must have established a distinction between, on the one hand, a dispute over *any* particularized determination and, on the other hand, a "challeng[e] to the validity of the Secretary's instructions and regulations," 476 U. S., at 680.[7] The former triggers § 1395ii's incorporation of § 405(h); the latter does not.

This case obviously falls into the latter category. Respondent in no way disputes any particularized determinations, but instead mounts a general challenge to the Secretary's regulations (and manual) prescribing inspection and enforcement procedures for the teams that survey participating nursing homes, 59 Fed. Reg. 56116 (1994), claiming that these were promulgated without notice and comment, are unconstitutionally vague, contravene the Medicare Act's requirement of enforcement consistency, and violate due process by affording insufficient administrative review. Like the *Michigan Academy* plaintiffs, who challenged the Secretary's regulation concerning the payment of benefits for physicians' services, 476 U. S., at 668, respondent may proceed in District Court under general federal-question jurisdiction.

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[7] For this reason, it is beside the point that Congress amended § 1395ff after *Michigan Academy* to make express provision for administrative and judicial review of Part B benefits claims. See Pub. L. 99–509, § 9341(a)(1)(B), 100 Stat. 2037. Congress has *not* substantively amended § 1395ii since *Michigan Academy,* and so *Michigan Academy*'s gloss on § 1395ii deserves as much *stare decisis* respect today as it ever has.

Perhaps recognizing that this result follows straightforwardly from what our *Michigan Academy* opinion actually says, the majority creatively recasts that decision as having established an exception to § 1395ii's incorporation of § 405(h): Section 1395ii will not apply "where its application to a particular category of cases, such as Medicare Part B 'methodology' challenges, would not lead to a channeling of review through the agency, but would mean no review at all." *Ante*, at 17. In doing so, the Court confuses the reasoning (more precisely, *one half* of the reasoning) of *Michigan Academy* with the holding in that case. In *Michigan Academy*, we undoubtedly relied on the reality that, if the challenge to the Secretary's regulations were not allowed to proceed under general federal-question jurisdiction, the Secretary's administration of Part B benefit amount determinations would be entirely insulated from judicial review, a result in tension with the "'strong presumption that Congress did not mean to prohibit all judicial review' of executive action."[8] 476 U. S., at 681 (quoting *Dunlop* v. *Bachow-*

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[8] The majority opinion may enjoy the "virtu[e] of consistency with *Michigan Academy*'s actual language," *ante*, at 19—but only *some* of the language, and not the most important part. As I explain in the text, the language that the majority opinion purports to track merely sets forth one of the two rationales for the holding in *Michigan Academy*. My reading

*ski,* 421 U. S. 560, 567 (1975)). But we placed at least equal reliance on the legislative history of the 1972 amendments to the Medicare Act, see 476 U. S., at 680, and our *holding* was that challenges to particular determinations would trigger § 1395ii, whereas challenges to the Secretary's instructions and regulations governing particular determinations would not, *ibid.;* see *supra,* at 38. Indeed, in setting aside the physicians' argument that § 405(h) bars general federal-question jurisdiction only when Congress has provided "specific procedures . . . for judicial review of final action by the Secretary," *Michigan Academy, supra,* at 679–680, we expressly *declined* to decide the case by announcing the "exception" suggested by the majority. While we might have done so, cf. *Mathews* v. *Eldridge,* 424 U. S. 319, 328–330 (1976) (describing limited exception to § 405(g)'s requirement that Secretary's decision be "final" before judicial review may be sought), we simply did not phrase our holding in those terms.

## II

To be sure, the reading of *Michigan Academy* that I would adopt (and that the Court of Appeals adopted below, 143 F. 3d 1072, 1075–1076 (CA7 1998)), dictates a different result in the earlier *Ringer* case. In *Ringer,* recall, the respondents were individual Medicare claimants who brought a challenge to the Secretary's policy regarding payment of Medicare benefits for a specific surgical procedure. As noted, we (and the parties) simply assumed that § 1395ii's incorporating reference to § 405(h) was triggered by such a challenge, and proceeded directly to decide the case based on § 405(h). And yet, under *Michigan Academy*'s gloss on § 1395ii, we would never have reached § 405(h) because § 1395ii would not have

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of *Michigan Academy,* not the majority's, is consistent with the language in *Michigan Academy* setting forth that case's *holding:* § 1395ii "foreclose[s] review only of 'amount determinations,' . . . [not] challenges to the validity of the Secretary's instructions and regulations." 476 U. S., at 680.

been activated by such a "challeng[e] to the validity of the Secretary's . . . regulatio[n]." 476 U. S., at 680.[9]

But it is one thing to conclude that the result in *Ringer* would have been different had we applied *Michigan Academy's* § 1395ii analysis to that case; it is quite another to declare that *Michigan Academy* effected a *sub silentio* overruling of *Ringer*. Contrary to the majority's representation, *ante*, at 18, my approach entails only the former, and therefore does not offend *stare decisis* principles as a *sub silentio* overruling would. As noted, *supra*, at 35, our opinion in *Ringer* did not expressly decide the meaning of § 1395ii, assuming instead (as the parties had done) that § 1395ii functions as a garden variety incorporating reference, *i. e.*, that § 1395ii incorporates § 405(h) in every case involving the Medicare Act. Accordingly, "[t]he most that can be said is that the point was in the cas[e] if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511 (1925). See also, *e. g., Lopez* v. *Monterey County*, 525 U. S. 266, 281 (1999) ("[T]his Court is not bound by its prior assumptions"); *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952). In other words, *Michigan Academy* could not have overruled *Ringer* (*sub silentio* or otherwise) on a point that *Ringer* did not decide. The majority opinion can therefore claim no support from its asserted "consistency with the holdings of earlier cases such as *Ringer.*" *Ante,* at 19. *Ringer* simply does not constitute a holding on the meaning of § 1395ii; or if it does, the majority has engaged in the very practice it condemns—a *sub silentio* overruling (of *Webster* v. *Fall, supra*).

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[9] While I readily agree with the majority's observation that my reading of *Michigan Academy* implies a different result in *Ringer*, I fail to comprehend the majority's assertion that my view of *Michigan Academy* also implies a different result in *Weinberger* v. *Salfi*, 422 U. S. 749 (1975). See *ante*, at 18–19. As noted, *supra*, at 34, *Salfi* was a Social Security case, and so § 405(h) applied of its own force.

Our post-*Michigan Academy* cases are entirely consistent with my reading of *Michigan Academy*. For example, in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U. S. 449 (1999), the challenge was directed to a particular determination of reimbursement benefits, and we held that § 405(h), as incorporated into the Medicare Act by § 1395ii, precluded resort to general federal-question jurisdiction.

Moreover, the majority's criticism of my approach as declaring a *sub silentio* overruling is just as well directed at itself, for *Ringer* is no less overruled by the majority's view of *Michigan Academy* than by my own. According to the majority, the *Michigan Academy* "exception" to § 1395ii applies where the aggrieved party "can obtain no review at all unless it can obtain judicial review in a § 1331 action." *Ante,* at 20. Consider how this test would apply to Freeman Ringer, one of the four plaintiffs in *Ringer.* Ringer sought to challenge the Secretary's policy proscribing reimbursement for a certain type of surgery (a Part A benefits issue), invoking general federal-question jurisdiction. He had no concrete reimbursement claim to present, for he did not possess the financial means to pay for the surgery up front and await reimbursement. Nor, apparently, could he obtain private financing for the surgery. See *Ringer,* 466 U. S., at 620; *id.,* at 637, n. 24 (STEVENS, J., concurring in judgment in part and dissenting in part) ("Ringer would like nothing more than to give the Secretary [the] opportunity [to rule on a concrete claim for reimbursement]"); Brief for Petitioners 42–43, n. 23. It seems to me that Ringer is the paradigmatic example of a party who "can obtain no review at all unless [he] can obtain judicial review in a § 1331 action," *ante,* at 20, such that he plainly would qualify for the *Michigan Academy* exception to § 1395ii as described by the majority.

The majority purports to reaffirm *Ringer in toto,* but it does so only by revising that case to hold that Ringer, notwithstanding his own inability to obtain judicial review without an anticipatory challenge, did not qualify for the *Michigan Academy* exception to § 1395ii because others in his class could afford to pursue review by undergoing the surgery and presenting a concrete claim for reimbursement. See *ante*, at 12. Setting aside the peculiarity of interpreting a statute to deny judicial review to the poor with the promise that the rich will obtain review in their stead,[10] the majority's gloss on *Ringer* ignores the *Ringer* Court's own description of its holding. In rejecting plaintiff Ringer's attempt to use § 1331, the *Ringer* Court did not rely on some notion that Ringer or those similarly situated to him could as a practical matter seek judicial review through some means other than § 1331; the Court instead reasoned that Ringer's claim was "essentially one requesting the payment of benefits for [a particular] surgery, a claim cognizable only under § 405(g)." 466 U. S., at 620.

## III

It would overstate matters to say that the foregoing analysis demonstrates beyond question that respondent may invoke general federal-question jurisdiction. Any remaining doubt is resolved, however, by the longstanding canon that "judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Gutierrez de Martinez* v. *Lamagno*, 515 U. S. 417, 424 (1995) (quoting *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967)). See also, *e. g.*, *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496 (1991);

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[10] The majority attempts to soften the blow by explaining that "individual hardship may be mitigated in a different way, namely, through excusing a number of the steps in the agency process, *though not the step of presentment of the matter to the agency.*" *Ante*, at 23 (emphasis added). But the italicized words show why the majority's concession provides cold comfort to a plaintiff like Ringer—or, arguably, the nursing homes represented by respondent here, see *ante*, at 21–22—who cannot afford to present a concrete claim to the agency, and thus can obtain neither administrative nor judicial review.

*Traynor* v. *Turnage,* 485 U. S. 535, 542 (1988); *Michigan Academy,* 476 U. S., at 670; *Johnson* v. *Robison,* 415 U. S. 361, 373–374 (1974); *Stark* v. *Wickard,* 321 U. S. 288, 309–310 (1944).

The rationale for this "presumption," *Abbott Laboratories, supra,* at 140, is straightforward enough: Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights. As Chief Justice Marshall explained:

> "'It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.'" *United States* v. *Nourse,* 9 Pet. 8, 28–29 (1835) (as quoted in *Gutierrez de Martinez, supra,* at 424).

See also S. Breyer, R. Stewart, C. Sunstein, & M. Spitzer, Administrative Law and Regulatory Policy 832 (4th ed. 1999) (suggesting that "the presumption of review owes its source to considerations of accountability and legislative supremacy, ideas embodied in article I, and also to rule of law considerations, embodied in the due process clause"); *Michigan Academy, supra,* at 681–682, n. 12 (noting that interpreting statute to allow judicial review would avoid the serious constitutional issue that would arise if a judicial forum for constitutional claims were denied).[11]

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[11] We have observed that Congress "reinforced" the presumption by enacting the Administrative Procedure Act (APA), which "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action

Contrary to the Secretary's representation, Brief for Petitioners 31–32, the presumption favors not merely judicial review "at some point," but *preenforcement* judicial review. While it is true that the presumption may not be quite as strong when the question is now-or-later instead of now-or-never, see *Thunder Basin Coal Co.* v. *Reich,* 510 U. S. 200, 207, n. 8, 215, n. 20 (1994), our cases clearly establish that the presumption applies in the former context. Indeed, *Abbott Laboratories,* the "important case . . . which marks the recent era of increased access to judicial review," Breyer, *supra,* at 831, itself involved a preenforcement challenge to a regulation. Although the Food, Drug, and Cosmetic Act (FDCA) did not authorize a preenforcement challenge to the type of regulation the Secretary had issued, and indeed expressly enumerated certain *other* kinds of regulations for which preenforcement review was available, we explained that these indicia of congressional intent must be viewed through the lens of the presumption:

> "The first question we consider is whether Congress by the [FDCA] intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories,* 387 U. S., at 139–140.

We thus held that the suit could proceed. *Id.,* at 148.

More recently, in *Haitian Refugee Center,* we reaffirmed the applicability of the presumption in the context of a preenforcement challenge. At issue in that case was the constitutionality of the Immigration and Naturalization Service's

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within the meaning of a relevant statute.'" *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140 (1967) (quoting 5 U. S. C. § 702 (1964 ed., Supp. III)).

(INS) procedures for administering an amnesty program for illegal aliens. Despite the availability of judicial review of these procedures in the context of statutorily authorized review of orders of exclusion or deportation, and notwithstanding the statute's express prohibition of judicial review of an INS "determination respecting an application for adjustment of status [under the amnesty program]," 8 U. S. C. § 1160(e)(1), we held that these factors did not suffice to trump the "strong presumption in favor of judicial review of administrative action." *Haitian Refugee Center*, 498 U. S., at 498.

The majority declines to employ the presumption in favor of preenforcement review to resolve the ambiguity in § 1395ii; instead, it concocts a presumption *against* preenforcement review, stating that its holding is "consisten[t] with the distinction that this Court has often drawn between a total preclusion of review and postponement of review." *Ante*, at 19 (citing *Salfi*, 422 U. S., at 762; *Thunder Basin Coal*, *supra*, at 207, n. 8; *Haitian Refugee Center*, *supra*, at 496–499). But *Thunder Basin Coal*, as noted, *supra*, at 45, teaches only that the presumption is not as strong when the problem is one of delayed judicial review rather than complete denial of judicial review—it does not establish that the presumption lacks *any* force in the former context. And *Haitian Refugee Center* directly *supports* the applicability of the presumption in favor of preenforcement review; we there invoked the presumption even though the plaintiffs had a postenforcement review option—voluntarily surrendering themselves for deportation and availing themselves of the statutorily authorized judicial review of an order of exclusion or deportation. 498 U. S., at 496. Only *Salfi* provides the majority with modest support insofar as it acknowledged (and distinguished) just the presumption against the *complete* denial of judicial review, 422 U. S., at 762, omitting mention of the presumption against delayed judicial review. But this omission is readily explained: Presentment of a Social

Security benefits claim for purposes of 42 U. S. C. § 405(g) is accomplished by the near-costless act of filing an application for benefits, to be contrasted with the extremely burdensome presentment requirement facing the aliens in *Haitian Refugee Center* or the named plaintiff in *Ringer.* The only significant hardship facing the claimants in *Salfi* arose from the possibility that a lengthy administrative review process would postpone a judicial decision ordering the Secretary to pay the disputed benefits; but the Court took care of that problem by leniently construing § 405(g)'s requirement of a "final" agency decision and by allowing the Secretary to waive entirely § 405(g)'s requirement that decision be made "after a hearing." At bottom, then, the majority cannot demonstrate why the presumption in favor of preenforcement review, which dates at least from *Abbott Laboratories,* should not be invoked to resolve the debate between our conflicting readings of § 1395ii.

There is a practical reason why we employ the presumption not only to questions of whether judicial review is available, but also to questions of *when* judicial review is available. Delayed review—that is, a requirement that a regulated entity disobey the regulation, suffer an enforcement proceeding by the agency, and only then seek judicial review—may mean no review at all. For when the costs of "presenting" a claim via the delayed review route exceed the costs of simply complying with the regulation, the regulated entity will buckle under and comply, even when the regulation is plainly invalid. See Seidenfeld, Playing Games with the Timing of Judicial Review, 58 Ohio St. L. J. 85, 104 (1997). And we can expect that this consequence will often flow from an interpretation of an ambiguous statute to bar preenforcement review. In *Haitian Refugee Center,* for example, the aliens' "postenforcement" review option for asserting their challenge to the agency's procedures required the aliens to voluntarily surrender themselves for deportation, suffer an order of deportation, and seek judicial review of that order in the court of appeals. These costs of presentment, we explained, were "[q]uite obviously . . . tantamount to a complete denial of judicial review for most undocumented aliens." 498 U. S., at 496–497.

A similar predicament faces the nursing homes represented by respondent in the instant case, who contend that the Secretary's regulations (and manual) governing enforcement of substantive standards are unlawful in various respects. The nursing homes' "postenforcement" review route is delineated by 42 U. S. C. § 1395cc(h)(1), which provides that "an institution or agency dissatisfied . . . with a determination described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title." While the meaning of "determination" in the referenced 42 U. S. C. § 1395cc(b)(2) (1994 ed., Supp. III) is not entirely free from doubt, the Secretary has interpreted these provisions to mean that administrative and judicial review is afforded for "any determination that a provider has failed to comply substantially with the statute, agreements, or regulations, whether termination or '*some other remedy* is imposed.'" *Ante*, at 21 (quoting Reply Brief for Petitioners 14 (emphasis in original)). Still, even under the Secretary's reading, an inspection team's assessment of a deficiency (for noncompliance) against the nursing home does not suffice to trigger administrative and judicial review under § 1395cc(h). Presentment of a claim via § 1395cc(h) requires the nursing home not merely to expose itself to an assessment of a deficiency by an inspection team, but also to forbear correction of the deficiency until the Secretary (or her state designees) impose a remedy.

Respondent and its *amici* advance several plausible reasons why such forbearance will prove costly—indeed, costly enough that compliance with the challenged regulations and manual is the more rational option. For one, nursing homes face the prospect of termination—the most severe of remedies—simply by virtue of failing to submit a voluntary plan of correction and correct the deficiencies. See 42 CFR § 488.456(b)(1) (1998). The Secretary's only response is that terminations are rarely imposed in fact, and certainly are not imposed where the provider has postponed correction of its deficiencies in order to preserve its appeal rights. But any such leniency is solely a matter of grace by the Secretary, see Tr. of Oral Arg. 31, and provides little comfort to a nursing facility pondering the § 1395cc(h) route to judicial review. And exposure to the termination remedy is not the only consequence faced by a nursing home that forestalls correction of its deficiencies. The Secretary also may impose civil monetary penalties, which accrue for each day of noncompliance, 42 CFR §§ 488.430, 488.440(b) (1998), and thus quite plainly stand as a calibrated deterrent to the forbearance strategy. Cf. *Ex parte Young*, 209 U. S. 123, 148 (1908) ("[T]o impose upon a party interested the burden of obtaining a judicial decision . . . only upon the condition that if unsuccessful he must suffer imprisonment and pay fines . . . is, in effect, to close up all approaches to the courts").[12] Other costs of the forbearance strategy are less tangible, but potentially as significant. For example, a finding of a deficiency at a nursing facility—which may well rest on unbalanced or inaccurate data—is posted in a place easily accessible to residents, 42 CFR § 483.10(g)(1) (1998), disclosed to the public, 42 U. S. C. § 1395i–3(g)(5)(A), and posted on the Health Care Finance Authority's Internet website, Reply Brief for Petitioners 20, n. 20.[13] Such negative publicity, which occurs before the nursing home may avail itself of administrative or judicial review via § 1395cc(h), is likely to result in substantial reputational harm. See *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167, 172 (1967) ("Respondents note the importance of public good will in their industry, and not without reason fear the disastrous impact of an announcement that their cosmetics have been seized as 'adulterated' ").

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[12] In *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200 (1994), the aggrieved mine operator was similarly subject to civil penalties ($5,000) for each day of noncompliance with statutory provisions, which would become final and payable after review by the agency and the appropriate court of appeals. *Id.*, at 204, n. 4, 218. But, unlike the nursing homes at issue here, the aggrieved mine operator apparently had the option of complying and then bringing a judicial challenge. See *id.*, at 221 (SCALIA, J., concurring in part and concurring in judgment).

I recount these allegations of hardship to respondent's members not because they inform any case-by-case application of the presumption in favor of preenforcement review, but rather because such concerns motivate the presumption in a general sense. A case-by-case inquiry into hardship is accommodated instead by ripeness doctrine, which "evaluate[s] both the fitness of the issues for judicial decision and the *hardship to the parties of withholding court consideration.*" *Abbott Laboratories,* 387 U. S., at 149 (emphasis added). I read our cases to establish just this sort of analysis: (1) in light of the presumption, construe an ambiguous statute in favor of preenforcement review; (2) apply ripeness doctrine to determine whether the suit should be entertained. Thus, in *Abbott Laboratories* and its two companion cases, we construed an ambiguous statute to permit preenforcement review, see *id.*, at 148; *Gardner* v. *Toilet Goods Assn., supra,* at 168; *Toilet Goods Assn., Inc.* v. *Gardner,* 387 U. S. 158, 160 (1967), but we then proceeded to hold that only the suits in the first two of these cases were ripe, *Abbott Laboratories*, *supra*, at 156; *Gardner* v. *Toilet Goods Assn.*, *supra*, at 170; *Toilet Goods Assn.* v. *Gardner*, *supra*, at 160–161. See also *Reno* v. *Catholic Social Services, Inc.*, 509 U. S. 43, 56–66 (1993) (similar). In line with this mode of analysis, the court below, after concluding that the Medicare Act does not preclude general federal-question jurisdiction over a preenforcement challenge to the Secretary's regulations, held that respondent's APA notice-and-comment challenge was ripe but that its constitutional vagueness claim was not. 143 F. 3d, at 1076–1077.

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[13] While the Secretary represents, Reply Brief for Petitioners 20, n. 20, and the Court accepts, *ante,* at 22, that a deficient nursing home may post a response on the website, respondent's *amici* American Health Care Association et al. assert that the website does not accommodate provider comments, but only lists the date a facility has corrected a deficiency, Brief for American Health Care Association et al. as *Amici Curiae* 18.

While I express no view on the proper application of ripeness doctrine to respondent's claims,[14] I am confident that this method of analysis enjoys substantially more support in our cases than does the majority's approach, which prescribes a case-by-case hardship inquiry at the threshold stage of determining whether preenforcement review has been precluded by statute. See *ante*, at 20 (holding that § 1395ii does not incorporate § 405(h) where the aggrieved party "can obtain no review at all unless it can obtain judicial review in a § 1331 action"). While the majority's variation would be harmless if its hardship test were no more stringent than the hardship prong of ordinary ripeness doctrine, I presume its test is more exacting—otherwise the majority opinion is no more than a well-disguised application of ripeness doctrine to the facts of this case.[15] At bottom, then, the majority superimposes a more burdensome hardship test on ordinary ripeness doctrine for aggrieved persons who seek to bring a preenforcement challenge to the Secretary's regulations under the Medicare Act.[16]

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[14] The Secretary did not seek review of the Court of Appeals' holding that respondent's APA notice-and-comment challenge is ripe, Pet. for Cert. I, and this Court denied respondent's cross-petition for certiorari seeking review of the Court of Appeals' holding that respondent's vagueness challenge is not ripe, 526 U. S. 1067 (1999).

[15] The majority acknowledges that its hardship test is more burdensome than the hardship prong of ripeness doctrine in at least one respect. We are told that the relevant hardship is not that endured by the "individual plaintiff," but rather that confronted by the "class" of persons similarly situated to the individual plaintiff. *Ante*, at 22–23; see *supra*, at 42–43.

* * *

Instead, I would hold that § 1395ii, as interpreted by *Michigan Academy,* does not in this case incorporate § 405(h)'s preclusion of federal-question jurisdiction, especially in light of the presumption in favor of preenforcement review. I respectfully dissent.

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[16] The majority betrays its misunderstanding of the relationship between the presumption in favor of preenforcement review and ripeness doctrine when it says that "any . . . presumption [in favor of preenforcement review] must be far weaker than a presumption against preclusion of all review in light of the traditional ripeness doctrine, which often requires initial presentation of a claim to an agency." *Ante,* at 19–20. I do not dispute that respondent must demonstrate that its claims are ripe before the District Court may entertain respondent's preenforcement challenge. My point is only that respondent should be *permitted* to make its ripeness argument and to have that argument assessed according to traditional ripeness doctrine, rather than facing statutory preclusion of review by (inevitably) failing the majority's "super-hardship" test. As I explained, *supra,* at 50, our cases establish a two-step analysis: (1) in light of the presumption in favor of preenforcement review, construe an ambiguous statute to allow preenforcement review; (2) apply ripeness doctrine to determine whether the suit should be entertained.

# UNITED STATES *v.* JOHNSON

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98–1696. Argued December 8, 1999—Decided March 1, 2000

Respondent had been serving time in federal prison for multiple drug and firearms felonies when two of his convictions were declared invalid. As a result, he had served 2.5 years' too much prison time and was at once set free, but a 3-year term of supervised release was yet to be served on the remaining convictions. He filed a motion to reduce his supervised release term by the amount of extra prison time he served. The District Court denied relief, explaining that the supervised release commenced upon respondent's actual release from incarceration, not before. The Sixth Circuit reversed, accepting respondent's argument that his supervised release term commenced not on the day he left prison, but when his lawful term of imprisonment expired.

*Held:* This Court is bound by the controlling statute, 18 U. S. C. § 3624(e), which, by its necessary operation, does not reduce the length of a supervised release term by reason of excess time served in prison. Under § 3624(e), a supervised release term does not commence until an individual "is released from imprisonment." The ordinary, commonsense meaning of "release" is to be freed from confinement. To say respondent was released while still imprisoned diminishes the concept the word intends to convey. Section 3624(e) also provides that a supervised release term comes "after imprisonment," once the prisoner is "released by the Bureau of Prisons to the supervision of a probation officer." Thus, supervised release does not run while an individual remains in the Bureau of Prisons' custody. The phrase "on the day the person is released" in § 3624(e) suggests a strict temporal interpretation, not some fictitious or constructive earlier time. Indeed, the section admonishes that "supervised release does not run during any period in which the person is imprisoned." The statute does provide for concurrent running of supervised release in specific, identified cases, but the Court infers that Congress limited § 3624(e) to the exceptions set forth. Finally, § 3583(e)(3) does not have a substantial bearing on the interpretive issue, for this directive addresses instances where conditions of supervised release have been violated, and the court orders a revocation. While the text of § 3624(e) resolves the case, the Court's conclusion accords with the objectives of supervised release, which include assisting individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration. The Court also observes that the statutory structure provides a means to address the equitable concerns that exist when an individual is incarcerated beyond the proper expiration of his prison term. The trial court, as it sees fit, may modify the individual's supervised release conditions, § 3583(e)(2), or it may terminate his supervised release obligations after one year of completed service, § 3583(e)(1). Pp. 56–60.

154 F. 3d 569, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

*Barbara McDowell* argued the cause for the United States. With her on the briefs were *Solicitor General Waxman, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben,* and *Richard A. Friedman.*

*Kevin M. Schad* argued the cause and filed a brief for respondent.*

JUSTICE KENNEDY delivered the opinion of the Court.

An offender had been serving time in federal prison for multiple felonies when two of his convictions were declared invalid. As a result, he had served too much prison time and was at once set free, but a term of supervised release was yet to be served on the remaining convictions. The question becomes whether the excess prison time should be credited to the supervised release term, reducing its length. Bound by the text of the controlling statute, 18 U. S. C. § 3624(e), we hold that the supervised release term remains unaltered.

Respondent Roy Lee Johnson was convicted in 1990 on two counts of possession with an intent to distribute controlled substances, 84 Stat. 1260, 21 U. S. C. § 841(a), on two counts of use of a firearm in connection with a drug trafficking crime, 18 U. S. C. § 924(c) (1994 ed. and Supp. IV), and on one count of possession of a firearm by a convicted felon, § 922(g). He received a sentence of 171 months' imprisonment, consisting of three concurrent 51-month terms on the § 841(a) and § 922(g) counts, to be followed by two consecutive 60-month terms on the § 924(c) counts. In addition, the District Court imposed a mandatory 3-year term of supervised release for the drug possession offenses. See 21 U. S. C. § 841(b)(1)(C) (1994 ed., Supp. III). The Court of Appeals, though otherwise affirming respondent's convictions and sentence, concluded the District Court erred in sentencing him to consecutive terms of imprisonment for the two § 924(c) firearm offenses. *United States* v. *Johnson*, 25 F. 3d 1335, 1337–1338 (CA6 1994) (en banc). On remand the District Court modified the prisoner's sentence to a term of 111 months.

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**Edward M. Chikofsky, Barbara E. Bergman,* and *Henry J. Bemporad* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

After our decision in *Bailey* v. *United States*, 516 U. S. 137 (1995), respondent filed a motion under 28 U. S. C. § 2255 to vacate his § 924(c) convictions, and the Government did not oppose. On May 2, 1996, the District Court vacated those convictions, modifying respondent's sentence to 51 months. He had already served more than that amount of time, so the District Court ordered his immediate release. His term of supervised release then went into effect. This dispute concerns its length.

In June 1996, respondent filed a motion requesting the District Court to reduce his supervised release term by 2.5 years, the extra time served on the vacated § 924(c) convictions. The District Court denied relief, explaining that pursuant to 18 U. S. C. § 3624(e) the supervised release commenced upon respondent's actual release from incarceration, not before. Granting respondent credit, the court observed, would undermine Congress' aim of using supervised release to assist convicted felons in their transitions to community life.

A divided Court of Appeals reversed. 154 F. 3d 569 (CA6 1998). The court accepted respondent's argument that his term of supervised release commenced not on the day he left prison confines but earlier, when his lawful term of imprisonment expired. *Id.*, at 571. Awarding respondent credit for the extra time served, the court further concluded, would provide meaningful relief because supervised release, while serving rehabilitative purposes, is also "punitive in nature." *Ibid.* Judge Gilman dissented, agreeing with the position of the District Court. *Id.*, at 572–573.

The Courts of Appeals have reached differing conclusions on the question presented. Compare *United States* v. *Blake,* 88 F. 3d 824, 825 (CA9 1996) (supervised release commences on the date defendants "should have been released, rather than on the dates of their actual release"), with *United States* v. *Jeanes,* 150 F. 3d 483, 485 (CA5 1998) (supervised release cannot run during any period of imprisonment); *United States* v. *Joseph,* 109 F. 3d 34 (CA1 1997) (same); *United States* v. *Douglas,* 88 F. 3d 533, 534 (CA8 1996) (same). We granted certiorari to resolve the question, 527 U. S. 1062 (1999), and we now reverse.

Section 3583(a) of Title 18 authorizes, and in some instances mandates, sentencing courts to order supervised release terms following imprisonment. On the issue presented for review—whether a term of supervised release begins on the date of actual release from incarceration or on an earlier date due to a mistaken interpretation of federal law—the language of § 3624(e) controls. The statute provides in relevant part:

> "A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or super-

> vised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days."

The quoted language directs that a supervised release term does not commence until an individual "is released from imprisonment." There can be little question about the meaning of the word "release" in the context of imprisonment. It means "[t]o loosen or destroy the force of; to remove the obligation or effect of; hence to alleviate or remove; . . . [t]o let loose again; to set free from restraint, confinement, or servitude; to set at liberty; to let go." Webster's New International Dictionary 2103 (2d ed. 1949). As these definitions illustrate, the ordinary, commonsense meaning of release is to be freed from confinement. To say respondent was released while still imprisoned diminishes the concept the word intends to convey.

The first sentence of § 3624(e) supports our construction. A term of supervised release comes "after imprisonment," once the prisoner is "released by the Bureau of Prisons to the supervision of a probation officer." Supervised release does not run while an individual remains in the custody of the Bureau of Prisons. The phrase "on the day the person is released," in the second sentence of § 3624(e), suggests a strict temporal interpretation, not some fictitious or constructive earlier time. The statute does not say "on the day the person is released or on the earlier day when he should have been released." Indeed, the third sentence admonishes that "supervised release does not run during any period in which the person is imprisoned."

The statute does provide for concurrent running of supervised release in specific cases. After the operative phrase "released from imprisonment," § 3624(e) requires the concurrent running of a term of supervised release with terms of probation, parole, or with other, separate terms of supervised release. The statute instructs that concurrency is permitted not for prison sentences but only for those other types of sentences given specific mention. The next sentence in the statute does address a prison term and does allow concurrent counting, but only for prison terms less than 30 days in length. When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth. The 30-day exception finds no application in this case; each of respondent's sentences, to which the term of supervised release attached, exceeded that amount of time. Finally, § 3583(e)(3) does not have a substantial bearing on the interpretive issue, for this directive addresses instances where conditions of supervised release have been violated, and the court orders a revocation.

Our conclusion finds further support in 18 U. S. C. § 3583(a), which authorizes the imposition of "a term of supervised release after imprisonment." This provision, too, is inconsistent with respondent's contention that confinement and supervised release can run at the same time. The statute's direction is clear and precise. Release takes place on the day the prisoner in fact is freed from confinement.

The Court of Appeals reasoned that reduction of respondent's supervised release term was a necessary implementation of § 3624(a), which provides that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment . . . ." All concede respondent's term of imprisonment should have ended earlier than it did. It does not follow, however, that the term of supervised release commenced, as a matter of law, once he completed serving his lawful sentences. It is true the prison term and the release term are related, for the latter cannot begin until the former expires. Though interrelated, the terms are not interchangeable. The Court of Appeals was mistaken in holding otherwise, and the text of § 3624(e) cannot accommodate the rule the Court of Appeals derived. Supervised release has no statutory function until confinement ends. Cf. *United States* v. *Granderson,* 511 U. S. 39, 50 (1994) (observing that "terms of supervised release . . . follow up prison terms"). The rule of lenity does not alter the analysis. Absent ambiguity, the rule of lenity is not applicable to guide statutory interpretation. Cf. *Gozlon-Peretz* v. *United States,* 498 U. S. 395, 410 (1991).

While the text of § 3624(e) resolves the case, we observe that our conclusion accords with the statute's purpose and design. The objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release. Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration. See § 3553(a)(2)(D); United States Sentencing Commission, Guidelines Manual §§ 5D1.3(c), (d), (e) (Nov. 1998); see also S. Rep. No. 98–225, p. 124 (1983) (declaring that "the primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release"). Sentencing courts, in determining the conditions of a defendant's supervised release, are required to consider, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," "the need . . . to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." 18 U. S. C. § 3553(a). In the instant case, the transition assistance ordered by the trial court required respondent, among other conditions, to avoid possessing or transporting firearms and to participate in a drug dependency treatment program. These conditions illustrate that supervised release, unlike incarceration, provides individuals with postconfinement assistance. Cf. *Gozlon-Peretz, supra,* at 407 (describing "[s]upervised release [a]s a unique method of postconfinement supervision invented by the Congress for a series of sentencing reforms"). The Court of Appeals erred in treating respondent's time in prison as interchangeable with his term of supervised release.

There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term. The statutory structure provides a means to address these concerns in large part. The trial court, as it sees fit, may modify an individual's conditions of supervised release. § 3583(e)(2). Furthermore, the court may terminate an individual's supervised release obligations "at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." § 3583(e)(1). Respondent may invoke § 3583(e)(2) in pursuit of relief; and, having completed one year of supervised release, he may also seek relief under § 3583(e)(1).

The statute, by its own necessary operation, does not reduce the length of a supervised release term by reason of excess time served in prison. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

# PORTUONDO, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY *v.* AGARD

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 98–1170. Argued November 1, 1999—Decided March 6, 2000

Respondent was convicted on New York criminal charges after a trial that required the jury to decide whether it believed the testimony of the victim and her friend or the conflicting testimony of respondent. The prosecutor challenged respondent's credibility during summation, calling the jury's attention to the fact that respondent had the opportunity to hear all other witnesses testify and to tailor his own testimony accordingly. The trial court rejected respondent's objection that these comments violated his right to be present at trial. After exhausting his state appeals, respondent filed a petition for habeas corpus in federal court claiming, *inter alia*, that the prosecutor's comments violated his Fifth and Sixth Amendment rights to be present at trial and confront his accusers, and his Fourteenth Amendment right to due process. The District Court denied his petition, but the Second Circuit reversed.

*Held:*

1. The prosecutor's comments did not violate respondent's Fifth and Sixth Amendment rights. The Court declines to extend to such comments the rationale of *Griffin* v. *California*, 380 U. S. 609, in which it held that a trial court's instruction about a defendant's refusal to testify unconstitutionally burdened his privilege against self-incrimination. As a threshold matter, respondent's claims find no historical support. *Griffin*, moreover, is a poor analogue for those claims. *Griffin* prohibited the prosecution from urging the jury to do something the jury is not permitted to do, and upon request a court must instruct the jury not to count a defendant's silence against him. It is reasonable to expect a jury to comply with such an instruction because inferring guilt from silence is not always "natural or irresistible," *id.*, at 615; but it is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he has heard the testimony of those who preceded him. In contrast to the comments in *Griffin*, which suggested that a defendant's silence is "evidence of guilt," *ibid.*, the prosecutor's comments in this case concerned respondent's credibility as a witness. They were therefore in accord with the Court's longstanding rule that when a defendant takes the stand, his credibility may be assailed like that of any

other witness—a rule that serves the trial's truth-seeking function, *Perry* v. *Leeke*, 488 U. S. 272, 282. That the comments here were generic rather than based upon a specific indication of tailoring does not render them infirm. Nor does the fact that they came at summation rather than at a point earlier in the trial. In *Reagan* v. *United States*, 157 U. S. 301, 304, the Court upheld the trial court's recitation of an interested-witness instruction that directed the jury to consider the defendant's deep personal interest in the case when evaluating his credibility. The instruction in *Reagan*, like the prosecutor's comments in this case, did not rely on any specific evidence of actual fabrication for its application, nor did it come at a time when the defendant could respond. Nevertheless, the Court considered the instruction to be perfectly proper. Pp. 65–73.

2. The prosecutor's comments also did not violate respondent's right to due process. To the extent his due process claim is based upon an alleged burdening of his Fifth and Sixth Amendment rights, it has been disposed of by the determination that those Amendments were not directly infringed. Respondent also argues, however, that it was improper to comment on his presence at trial because New York law requires him to be present. Respondent points to the Court's decision in *Doyle* v. *Ohio*, 426 U. S. 610, for support. The Court held in *Doyle* that the prosecution may not impeach a defendant with his post-*Miranda* warnings silence because those warnings carry an implicit "assurance that silence will carry no penalty." *Id.*, at 618. No promise of impunity is implicit in a statute requiring a defendant to be present at trial, and there is no authority whatever for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial violates due process. Pp. 74–75.

117 F. 3d 696, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 76. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 76.

*Andrew A. Zwerling* argued the cause for petitioner. With him on the briefs were *Richard A. Brown*, *John M. Castellano*, and *Ellen C. Abbot*.

*Jonathan E. Nuechterlein* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney*

*General Robinson, Deputy Solicitor General Dreeben,* and *Deborah Watson.*

*Beverly Van Ness* argued the cause and filed a brief for respondent.*

JUSTICE SCALIA delivered the opinion of the Court.

In this case we consider whether it was constitutional for a prosecutor, in her summation, to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly.

## I

Respondent's trial on 19 sodomy and assault counts and 3 weapons counts ultimately came down to a credibility determination. The alleged victim, Nessa Winder, and her friend, Breda Keegan, testified that respondent physically assaulted, raped, and orally and anally sodomized Winder, and that he threatened both women with a handgun. Respondent testified that he and Winder had engaged in consensual vaginal intercourse. He further testified that during an argument he had with Winder, he struck her once in the face. He denied raping her or threatening either woman with a handgun.

During summation, defense counsel charged Winder and Keegan with lying. The prosecutor similarly focused on the credibility of the witnesses. She stressed respondent's interest in the outcome of the trial, his prior felony conviction, and his prior bad acts. She argued that respondent was a "smooth slick character . . . who had an answer for every-

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*Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the New York State District Attorneys Association by *William J. Fitzpatrick, Steven A. Hovani,* and *Michael J. Miller.*

*Deanne E. Maynard* and *Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

thing," App. 45, and that part of his testimony "sound[ed] rehearsed," *id.*, at 48. Finally, over defense objection, the prosecutor remarked:

> "You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
>
> . . . . .
>
> "That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?
>
> . . . . .
>
> "He's a smart man. I never said he was stupid. . . . He used everything to his advantage." *Id.*, at 49.

The trial court rejected defense counsel's claim that these last comments violated respondent's right to be present at trial. The court stated that respondent's status as the last witness in the case was simply a matter of fact, and held that his presence during the entire trial, and the advantage that this afforded him, "may fairly be commented on." *Id.*, at 54.

Respondent was convicted of one count of anal sodomy and two counts of third-degree possession of a weapon. On direct appeal, the New York Supreme Court reversed one of the convictions for possession of a weapon but affirmed the remaining convictions. *People* v. *Agard*, 199 App. Div. 2d 401, 606 N. Y. S. 2d 239 (2d Dept. 1993). The New York Court of Appeals denied leave to appeal. *People* v. *Agard*, 83 N. Y. 2d 868, 635 N. E. 2d 298 (1994).

Respondent then filed a petition for habeas corpus relief in federal court, claiming, *inter alia*, that the prosecutor's comments violated his Fifth and Sixth Amendment rights to be present at trial and confront his accusers. He further claimed that the comments violated his Fourteenth Amendment right to due process. The District Court denied the petition in an unpublished order. A divided panel of the Second Circuit reversed, holding that the prosecutor's comments violated respondent's Fifth, Sixth, and Fourteenth Amendment rights. 117 F. 3d 696 (1997), rehearing denied, 159 F. 3d 98 (1998). We granted certiorari. 526 U. S. 1016 (1999).

## II

Respondent contends that the prosecutor's comments on his presence and on the ability to fabricate that it afforded him unlawfully burdened his Sixth Amendment right to be present at trial and to be confronted with the witnesses against him, see *Illinois* v. *Allen*, 397 U. S. 337 (1970); *Pointer* v. *Texas*, 380 U. S. 400 (1965), and his Fifth and Sixth Amendment rights to testify on his own behalf, see *Rock* v. *Arkansas*, 483 U. S. 44 (1987). Attaching the cost of impeachment to the exercise of these rights was, he asserts, unconstitutional.

Respondent's argument boils down to a request that we extend to comments of the type the prosecutor made here the rationale of *Griffin* v. *California*, 380 U. S. 609 (1965), which involved comments upon a defendant's *refusal* to testify. In that case, the trial court instructed the jury that it was free to take the defendant's failure to deny or explain facts within his knowledge as tending to indicate the truth of the prosecution's case. This Court held that such a comment, by "solemniz[ing] the silence of the accused into evidence against him," unconstitutionally "cuts down on the privilege [against self-incrimination] by making its assertion costly." *Id.*, at 614.

We decline to extend *Griffin* to the present context. As an initial matter, respondent's claims have no historical foundation, neither in 1791, when the Bill of Rights was adopted, nor in 1868 when, according to our jurisprudence, the Fourteenth Amendment extended the strictures of the Fifth and Sixth Amendments to the States. The process by which criminal defendants were brought to justice in 1791 largely obviated the need for comments of the type the prosecutor made here. Defendants routinely were asked (and agreed) to provide a pretrial statement to a justice of the peace detailing the events in dispute. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self-Incrimination 109, 112, 114 (R. Helmholz et al. eds. 1997). If their story at trial—where they typically spoke and conducted their defense personally, without counsel, see J. Goebel & T. Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664–1776), p. 574 (1944); A. Scott, Criminal Law in Colonial Virginia 79 (1930)—differed from their pretrial statement, the contradiction could be noted. See Levy, Origins of the Fifth Amendment and Its Critics, 19 Cardozo L. Rev. 821, 843 (1997). Moreover, what they said at trial was not considered to be evidence, since they were disqualified from testifying under oath. See 2 J. Wigmore, Evidence § 579 (3d ed. 1940).

The pretrial statement did not begin to fall into disuse until the 1830's, see Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination, *supra*, at 198, and the first State to make defendants competent witnesses was Maine, in 1864, see 2 Wigmore, *supra*, § 579, at 701. In response to these developments, some States attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses. See 3 J. Wigmore, Evidence §§ 1841, 1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Tenn. Code Ann., ch. 4, § 5601 (1896). Although the majority of States did not impose such a restriction, there is no evidence to suggest they also took the affirmative step of forbidding comment upon the defendant's opportunity to tailor his testimony. The dissent faults us for "call[ing] up no instance of an 18th- or 19th-century prosecutor's urging that a defendant's presence at trial facilitated tailored testimony." *Post*, at 84 (opinion of GINSBURG, J.). We think the burden is rather upon respondent and the dissent, who assert the unconstitutionality of the practice, to come up with a case in which such urging was held improper. They cannot even produce one in which the practice was so much as *challenged* until after our decision in *Griffin.* See, *e. g., State* v. *Cassidy,* 236 Conn. 112, 126–127, 672 A. 2d 899, 907–908 (1996); *People* v. *Buckey,* 424 Mich. 1, 8–15, 378 N. W. 2d 432, 436–439 (1985); *Jenkins* v. *United States,* 374 A. 2d 581, 583–584 (D. C. 1977). This absence cuts in favor of respondent (as the dissent asserts) only if it is possible to believe that after reading *Griffin* prosecutors suddenly realized that commenting on a testifying defendant's unique ability to hear prior testimony was a *good* idea. Evidently, prosecutors were making these comments all along without objection; *Griffin* simply sparked the notion that such commentary *might* be problematic.

Lacking any historical support for the constitutional rights that he asserts, respondent must rely entirely upon our opinion in *Griffin.* That case is a poor analogue, however, for several reasons. What we prohibited the prosecutor from urging the jury to do in *Griffin* was something *the jury is not permitted to do.* The defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him—and upon request the court must instruct the jury to that effect. See *Carter* v. *Kentucky,* 450 U. S. 288 (1981). It is reasonable enough to expect a jury to comply with that instruction since, as we observed in *Griffin,* the inference of guilt from silence is not always "natural or irresistible." 380 U. S., at 615. A defendant might refuse to testify simply out of fear that he will be made to look bad by clever counsel, or fear "'that his prior convictions will prejudice the jury.'" *Ibid.* (quoting *People* v. *Modesto,* 62 Cal. 2d 436, 453, 398 P. 2d 753, 763 (1965) (en banc)). By contrast, it *is* natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him. It is one thing (as *Griffin* requires) for the jury to evaluate all the *other* evidence in the case without giving any effect to the defendant's refusal to testify; it is something else (and quite impossible) for the jury to evaluate the credibility of the defendant's testimony while blotting out from its mind the fact that before giving the testimony the defendant had been sitting there listening to the other witnesses. Thus, the principle respondent asks us to adopt here differs from what we adopted in *Griffin* in one or the other of the following respects: It either prohibits inviting the jury to do what the jury is perfectly entitled to do; or it requires the jury to do what is practically impossible.[1]

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[1] The dissent seeks to place us in the position of defending the proposition that inferences that the jury is free to make are inferences that the prosecutor must be free to invite. *Post,* at 86–87. Of course we say no such thing. We simply say (in the sentence to which this note is appended) that forbidding invitation of a *permissible* inference is one of two alternative respects in which this case is substantially different from respondent's sole source of support, *Griffin.* Similarly, the dissent seeks to place us in the position of defending the proposition that it is more natural to infer tailoring from presence than to infer guilt from silence. *Post,* at 84–86. The quite different point we do make is that inferring *opportunity to tailor* from presence is inevitable, and prohibiting that inference (while simultaneously asking the jury to evaluate the veracity of the defendant's testimony) is demanding the impossible—producing the other alternative respect in which this case differs from *Griffin.*

The dissent seeks to rebut this point by asserting that in the present case the prosecutorial comments went beyond pointing out the opportunity to tailor and actually made an accusation of tailoring. It would be worth inquiring into that subtle distinction if the dissent proposed to permit the former while forbidding the latter. It does not, of course; nor, as far as we know, does any other authority. Drawing the line between pointing out the availability of the inference and inviting the inference would be neither useful nor practicable. Thus, under the second alternative described above, the jury must be prohibited from taking into account the opportunity of tailoring.

Second, *Griffin* prohibited comments that suggest a defendant's silence is "evidence of *guilt*." 380 U. S., at 615 (emphasis added); see also *United States* v. *Robinson*, 485 U. S. 25, 32 (1988) ("'*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt'" (quoting *Baxter* v. *Palmigiano*, 425 U. S. 308, 319 (1976))). The prosecutor's comments in this case, by contrast, concerned respondent's *credibility as a witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, "his credibility may be impeached and his testimony assailed like that of any other witness." *Brown* v. *United States*, 356 U. S. 148, 154 (1958). "[W]hen [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well." *Perry* v. *Leeke*, 488 U. S. 272, 282 (1989). See also *Reagan* v. *United States*, 157 U. S. 301, 305 (1895).

Respondent points to our opinion in *Geders* v. *United States*, 425 U. S. 80, 87–91 (1976), which held that the defendant must be treated differently from other witnesses insofar as sequestration orders are concerned, since sequestration for an extended period of time denies the Sixth Amendment right to counsel. With respect to issues of credibility, however, no such special treatment has been accorded. *Jenkins* v. *Anderson*, 447 U. S. 231 (1980), illustrates the point. There the prosecutor in a first-degree murder trial, during cross-examination and again in closing argument, attempted to impeach the defendant's claim of self-defense by suggesting that he would not have waited two weeks to report the killing if that was what had occurred. In an argument strikingly similar to the one presented here, the defendant in *Jenkins* claimed that commenting on his prearrest silence violated his Fifth Amendment privilege against self-incrimination because "a person facing arrest will not remain silent if his failure to speak later can be used to impeach him." *Id.*, at 236. The Court noted that it was not clear whether the Fifth Amendment protects prearrest silence, *id.*, at 236, n. 2, but held that, *assuming it does*, the prosecutor's comments were constitutionally permissible. "[T]he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Id.*, at 236 (quoting *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 30 (1973)). Once a defendant takes the stand, he is "'subject to cross-examination impeaching his credibility just like any other witness.'" *Jenkins, supra*, at 235–236 (quoting *Grunewald* v. *United States*, 353 U. S. 391, 420 (1957)).

Indeed, in *Brooks* v. *Tennessee*, 406 U. S. 605 (1972), the Court suggested that arguing credibility to the jury—which would include the prosecutor's comments here—is the preferred means of counteracting tailoring of the defendant's testimony. In that case, the Court found unconstitutional Tennessee's attempt to defeat tailoring by requiring defendants to testify at the outset of the defense or not at all. This requirement, it said, impermissibly burdened the defendant's right to testify because it forced him to decide whether to do so before he could determine that it was in his best interest. *Id.*, at 610. The Court expressed its awareness, however, of the danger that tailoring presented. The antidote, it said, was not Tennessee's heavy-handed rule, but the more nuanced "adversary system[, which] reposes judgment of the credibility of all witnesses in the jury." *Id.*, at 611. The adversary system surely envisions—indeed, it requires—that the prosecutor be allowed to bring to the jury's attention the danger that the Court was aware of.

Respondent and the dissent also contend that the prosecutor's comments were impermissible because they were "generic" rather than based upon any specific indication of tailoring. Such comment, the dissent claims, is unconstitutional because it "does not serve to distinguish guilty defendants from innocent ones." *Post*, at 77. But this Court has approved of such "generic" comment before. In *Reagan,* for example, the trial court instructed the jury that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered . . . in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." 157 U. S., at 304. The instruction did not rely on any specific evidence of actual fabrication for its application; nor did it, directly at least, delineate the guilty and the innocent. Like the comments in this case, it simply set forth a consideration the jury was to have in mind when assessing the defendant's credibility, which, *in turn,* assisted it in determining the guilt of the defendant. We deemed that instruction perfectly proper. Thus, that the comments before us here did not, of their own force, demonstrate the guilt of the defendant, or even distinguish among defendants, does not render them infirm.[2]

Finally, the Second Circuit held, and the dissent contends, that the comments were impermissible here because they were made, not during cross-examination, but at summation, leaving the defense no opportunity to reply. 117 F. 3d, at 708, and n. 6. That this is not a constitutionally significant distinction is demonstrated by our decision in *Reagan.* There the challenged instruction came at the end of the case, after the defense had rested, just as the prosecutor's comments did here.[3]

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[2] The dissent's stern disapproval of generic comment (it "tarnishes the innocent no less than the guilty," *post,* at 77–78; it suffers from an "incapacity to serve the individualized truth-finding function of trials," *post,* at 80; so that "when a defendant's exercise of a constitutional fair trial right is 'insolubly ambiguous' as between innocence and guilt, the prosecutor may not urge the jury to construe the bare invocation of the right against the defendant," *post,* at 78) hardly comports with its praising the Court of Appeals for its "carefully restrained and moderate position" in forbidding this monstrous practice only on summation and allowing it during the rest of the trial, *ibid.* The dissent would also allow a prosecutor to remark at any time—even at summation—on the convenient "fit" between specific elements of a defendant's testimony and the testimony of others. *Ibid.* It is only a "general accusation of tailoring" that is forbidden. *Ibid.* But if the dissent believes that comments which "invite the jury to convict on the basis of conduct as consistent with innocence as with guilt" should be out of bounds, *post,* at 79—or at least should be out of bounds in summation—comments focusing on such "fit" must similarly be forbidden. As the dissent acknowledges, "fit" is as likely to result from the defendant's "sheer innocence" as from anything else. *Post,* at 85.

Our trial structure, which requires the defense to close before the prosecution, regularly forces the defense to predict what the prosecution will say. Indeed, defense counsel in this case explained to the jury that it was his job in "closing argument here to try and anticipate as best [he could] some of the arguments that the prosecution [would] be making." App. 25–27. What *Reagan* permitted—a generic interested-witness instruction, *after the defense has closed*—is in a long tradition that continues to the present day. See, *e. g., United States* v. *Jones,* 587 F. 2d 802 (CA5 1979); *United States* v. *Hill,* 470 F. 2d 361 (CADC 1972); 2 C. Wright, Federal Practice and Procedure §501, and n. 1 (1982). Indeed, the instruction was given in this very case. See Tr. 834 ("A defendant is of course an interested witness since he is interested in the outcome of the trial. You may as jurors wish to keep such interest in mind in determining the credibility and weight to be given to the defendant's testimony").[4] There is absolutely nothing to support the dissent's contention that for purposes of determining the validity of generic attacks upon credibility "the distinction between cross-examination and summation is critical," *post,* at 87.

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[3] The dissent maintains that *Reagan* v. *United States,* 157 U. S. 301 (1895), is inapposite to the question presented in this case because it considered the effect of an interested-witness instruction on a defendant's *statutory* right to testify, rather than on his *constitutional* right to testify. See *id.,* at 304 (citing Act of Mar. 16, 1878, ch. 37, 20 Stat. 30, as amended, 18 U. S. C. § 3481). That is a curious position for the dissent to take. *Griffin*—the case the dissent claims controls the outcome here—relied almost exclusively on the very statute at issue in *Reagan* in defining the contours of the Fifth Amendment right prohibiting comment on the failure to testify. After quoting the Court's description, in an earlier case, of the reasons for the statutory right, see *Wilson* v. *United States,* 149 U. S. 60 (1893), the *Griffin* Court said: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected." 380 U. S., at 613–614. It is eminently reasonable to consider that a questionable manner of constitutional exegesis, see *Mitchell* v. *United States,* 526 U. S. 314, 336 (1999) (SCALIA, J., dissenting); it is not reasonable to make *Griffin* the very centerpiece of one's case while simultaneously denying that the statute construed in *Reagan* (and *Griffin*) has anything to do with the meaning of the Constitution. The interpretation of the statute in *Reagan* is in fact a much *more* plausible indication of constitutional understanding than the application of the statute in *Griffin:* The Constitution must have allowed what *Reagan* said the statute permitted, because otherwise the Court would have been interpreting the statute in a manner that rendered it void. *Griffin,* on the other hand, relied upon the much shakier proposition that a practice which the statute *prohibited* must be prohibited by the Constitution as well.

In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

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[4] It is hard to understand how JUSTICE STEVENS reconciles the unquestionable propriety of the standard interested-witness instruction with his conclusion that comment upon the opportunity to tailor, although it is constitutional, "demean[s] [the adversary] process" and "should be discouraged." *Post,* at 76 (opinion concurring in judgment). Our decision, in any event, is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice. The latter question, as well as the desirability of putting prosecutorial comment into proper perspective by judicial instruction, are best left to trial courts, and to the appellate courts which routinely review their work.

## III

Finally, we address the Second Circuit's holding that the prosecutor's comments violated respondent's Fourteenth Amendment right to due process. Of course to the extent this claim is based upon alleged burdening of Fifth and Sixth Amendment rights, it has already been disposed of by our determination that those Amendments were not infringed. Cf. *Graham* v. *Connor*, 490 U. S. 386, 395 (1989) (where an Amendment "provides an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [the] claims").

Respondent contends, however, that because New York law required him to be present at his trial, see N. Y. Crim. Proc. Law § 260.20 (McKinney 1993); N. Y. Crim. Proc. Law § 340.50 (McKinney 1994), the prosecution violated his right to due process by commenting on that presence. He asserts that our decision in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), requires such a holding. In *Doyle*, the defendants, after being arrested for selling marijuana, received their *Miranda* warnings and chose to remain silent. At their trials, both took the stand and claimed that they had not sold marijuana, but had been "framed." 426 U. S., at 613. To impeach the defendants, the prosecutors asked each why he had not related this version of events at the time he was arrested. We held that this violated the defendants' rights to due process because the *Miranda* warnings contained an implicit "assurance that silence will carry no penalty." 426 U. S., at 618.

Although there might be reason to reconsider *Doyle*, we need not do so here. "[W]e have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher* v. *Weir*, 455 U. S. 603, 606 (1982) *(per curiam)*. The *Miranda* warnings had, after all, specifically given the defendant both the option of speaking and the option of remaining silent—and had then gone on to say that if he chose the former option what he said could be used against him. It is possible to believe that this contained an implicit promise that his choice of the option of silence would *not* be used against him. It is not possible, we think, to believe that a similar promise of impunity is implicit in a statute requiring the defendant to be present at trial.

Respondent contends that this case contains an element of unfairness even worse than what existed in *Doyle:* Whereas the defendant in that case had the ability to avoid impairment of his case by choosing to speak rather than remain silent, the respondent here (he asserts) had no choice but to be present at the trial. Though this is far from certain, see, *e. g., People* v. *Aiken,* 45 N. Y. 2d 394, 397, 380 N. E. 2d 272, 274 (1978) ("[A] defendant charged with a felony not punishable by death may, by his voluntary and willful absence from trial, waive his right to be present at every stage of his trial"), we shall assume for the sake of argument that it is true. There is, however, no authority whatever for the proposition that the impairment of credibility, if any, caused by mandatory presence at trial violates due process. If the ability to avoid the accusation (or suspicion) of tailoring were as crucial a factor as respondent contends, one would expect criminal defendants—in jurisdictions that do not have compulsory attendance requirements—frequently to absent themselves from trial when they intend to give testimony. But to our knowledge, a criminal trial without the defendant present is a rarity. Many long established elements of criminal procedure deprive a defendant of advantages he would otherwise possess—for example, the requirement that he plead to the charge before, rather than after, all the evidence is in. The consequences of the requirement that he be present at trial seem to us no worse.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring in the judgment.

While I am not persuaded that the prosecutor's summation crossed the high threshold that separates trial error—even serious trial error—from the kind of fundamental unfairness for which the Constitution requires that a state criminal conviction be set aside, cf. *Rose* v. *Lundy*, 455 U. S. 509, 543–544 (1982), I must register my disagreement with the Court's implicit endorsement of her summation.

The defendant's Sixth Amendment right "to be confronted with the witnesses against him" serves the truth-seeking function of the adversary process. Moreover, it also reflects respect for the defendant's individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned. The prosecutor's argument in this case demeaned that process, violated that respect, and ignored that presumption. Clearly such comment should be discouraged rather than validated.

The Court's final conclusion, which I join, that the argument survives constitutional scrutiny does not, of course, deprive States or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial.

Accordingly, although I agree with much of what JUSTICE GINSBURG has written, I concur in the Court's judgment.

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

The Court today transforms a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility. I dissent from the Court's disposition. In

*Griffin* v. *California*, 380 U. S. 609 (1965), we held that a defendant's refusal to testify at trial may not be used as evidence of his guilt. In *Doyle* v. *Ohio*, 426 U. S. 610 (1976), we held that a defendant's silence after receiving *Miranda* warnings did not warrant a prosecutor's attack on his credibility. Both decisions stem from the principle that where the exercise of constitutional rights is "insolubly ambiguous" as between innocence and guilt, *id.*, at 617, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant.

The same principle should decide this case. Ray Agard attended his trial, as was his constitutional right and his statutory duty, and he testified in a manner consistent with other evidence in the case. One evident explanation for the coherence of his testimony cannot be ruled out: Agard may have been telling the truth. It is no more possible to know whether Agard used his presence at trial to figure out how to tell potent lies from the witness stand than it is to know whether an accused who remains silent had no exculpatory story to tell.

The burden today's decision imposes on the exercise of Sixth Amendment rights is justified, the Court maintains, because "the central function of the trial . . . is to discover the truth." See *ante*, at 73. A trial ideally is a search for the truth, but I do not agree that the Court's decision advances that search. The generic accusation that today's decision permits the prosecutor to make on summation does not serve to distinguish guilty defendants from innocent ones. Every criminal defendant, guilty or not, has the right to attend his trial. U. S. Const., Amdt. 6. Indeed, as the Court grants, *ante*, at 74, New York law *requires* defendants to be present when tried. It follows that every defendant who testifies is equally susceptible to a generic accusation about his opportunity for tailoring. The prosecutorial comment at issue, tied only to the defendant's presence in the courtroom and not to his actual testimony, tarnishes the innocent no less than the guilty. Nor can a jury measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case. An irrebuttable observation that can be made about any testifying defendant cannot sort those who tailor their testimony from those who do not, much less the guilty from the innocent.

## I

The Court of Appeals took a carefully restrained and moderate position in this case. It held that a prosecutor may not, as part of her summation, use the mere fact of a defendant's presence at his trial as the basis for impugning his credibility. A prosecutor who wishes at any stage of a trial to accuse a defendant of tailoring specific elements of his testimony to fit with particular testimony given by other witnesses would, under the decision of the Court of Appeals, have leave to do so. See 159 F. 3d 98, 99 (CA2 1998). Moreover, on cross-examination, a prosecutor would be free to challenge a defendant's overall credibility by pointing out that the defendant had the opportunity to tailor his testimony in general, even if the prosecutor could point to no facts suggesting that the defendant had actually engaged in tailoring. See 117 F. 3d 696, 708, n. 6 (CA2 1997). The Court of Appeals held only that the prosecutor may not launch a general accusation of tailoring on summation. See *id.*, at 709; see also *United States* v. *Chacko*, 169 F. 3d 140, 150 (CA2 1999). Thus, the decision below would rein in a prosecutor solely in situations where there is no particular reason to believe that tailoring has occurred and where the defendant has no opportunity to rebut the accusation.

The Court of Appeals' judgment was correct in light of *Griffin* and *Doyle*. Those decisions instruct that when a defendant's exercise of a constitutional fair trial right is "insolubly ambiguous" as between innocence and guilt, the prosecutor may not urge the jury to construe the bare invocation of the right against the defendant. See *Doyle*, 426 U. S., at

617. To be sure, defendants are not categorically exempt from some costs associated with the assertion of their constitutional prerogatives. The Court is correct to say that the truth-seeking function of trials places demands on defendants. In a proper case, that central function could justify a particular burden on the exercise of Sixth Amendment rights. But the interests of truth are not advanced by allowing a prosecutor, at a time when the defendant cannot respond, to invite the jury to convict on the basis of conduct as consistent with innocence as with guilt. Where burdening a constitutional right will not yield a compensating benefit, as in the present case, there is no justification for imposing the burden.

The truth-seeking function of trials may be served by permitting prosecutors to make accusations of tailoring—even wholly generic accusations of tailoring—as part of cross-examination. Some defendants no doubt do give false testimony calculated to fit with the testimony they hear from other witnesses. If accused on cross-examination of having tailored their testimony, those defendants might display signals of untrustworthiness that it is the province of the jury to detect and interpret. But when a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants equally and therefore does not help answer the question that is the essence of a trial's search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence?[1]

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[1] The prosecutor made the following comment on summation: "A lot of what [the defendant] told you corroborates what the complaining witnesses told you. The only thin[g] that doesn't is the denials of the crimes. Everything else fits perfectly." App. 46–47. That, according to the prosecution, is reason for the jury to be suspicious that the defendant falsely tailored his testimony. The implication of this argument seems to be that the more a defendant's story hangs together, the more likely it is that he is lying. To claim that such an argument helps find truth at trial is to step completely through the looking glass.

In addition to its incapacity to serve the individualized truth-finding function of trials, a generic tailoring argument launched on summation entails the simple unfairness of preventing a defendant from answering the charge. This problem was especially pronounced in the instant case. Under New York law, defendants generally may not bolster their own credibility by introducing their prior consistent statements but may introduce such statements to rebut claims of recent fabrication. See *People* v. *McDaniel,* 81 N. Y. 2d 10, 16, 611 N. E. 2d 265, 268 (1993); 117 F. 3d, at 715 (Winter, C. J., concurring). Had the prosecution made its tailoring accusations on cross-examination, Agard might have been able to prove that his story at trial was the same as it had been before he heard the testimony of other witnesses. A prosecutor who can withhold a tailoring accusation until summation can avert such a rebuttal.

The Court's only support for its choice to ignore the distinction between summation and cross-examination is *Reagan* v. *United States,* 157 U. S. 301 (1895), a decision which, by its very terms, does not bear on today's constitutional controversy. It is true, as the Court says, that *Reagan* upheld a trial judge's instruction that questioned the credibility of a testifying defendant in a generic manner, and it is also true that a defendant is no more able to respond to an instruction than to a prosecutor's summation. But *Reagan* has no force as precedent for this case because, in the 1895 Court's view, the instruction there at issue did not burden any constitutional right of the defendant.

The trial court in *Reagan* instructed the jury that when it evaluated the credibility of the defendant's testimony, it could consider that defendants have a powerful interest in being acquitted, powerful enough that it might induce some people to lie. See *id.,* at 304–305. This instruction burdened the defendant's right to testify at his own trial. But the Court that decided *Reagan* conceived of that right as one dependent on a statute, not on any constitutional prescription. See *id.*, at 304 (defendant was qualified to testify under oath pursuant to an 1878 Act of Congress, ch. 37, 20 Stat. 30, which removed the common-law disability that had previously prevented defendants from giving sworn testimony). No one in that 19th-century case suggested that the trial court's comment exacted a penalty for the exercise of any constitutional right.[2] It is thus inaccurate for the Court to portray *Reagan* as precedent for the proposition that the difference between summation and cross-examination "is not a constitutionally significant distinction." *Ante*, at 72. *Reagan* made no determination of constitutional significance or insignificance, for it addressed no constitutional question.

The Court endeavors to bring *Reagan* within constitutional territory by yoking it to *Griffin*. The Court asserts that *Griffin* relied on the very statute that defined the rights of the defendant in *Reagan* and that *Griffin*'s holding makes sense only if the statute in *Reagan* carries constitutional implications. *Ante*, at 72, n. 3. This argument is flawed in its premise, because *Griffin* rested solidly on the Fifth Amendment. The Court in *Griffin* did refer to the 1878 statute at issue in *Reagan*, but it did so only in connection with its discussion of *Wilson* v. *United States*, 149 U. S. 60 (1893), a decision construing a different provision of that statute to prohibit federal prosecutors from commenting to juries on defendants' failure to testify. See *Griffin*, 380 U. S., at 612–613. The statute at issue in *Reagan* and *Wilson*, now codified at 18 U. S. C. § 3481, provides that defendants in criminal trials have both the right to testify and the right not to testify. *Reagan* concerned the former right, *Wilson* the latter right, and *Griffin* the constitutional analogue to the latter right. If the Court in *Griffin* had regarded the statute as settling the meaning of the Fifth Amendment—an odd position to imagine the Court taking—then it could have rested on *Wilson*. It did not. It said that *Wilson* would govern were the question presented a statutory one, but that the question before it was constitutional: "The question remains whether, *statute or not*, the comment . . . violates the Fifth Amendment." 380 U. S., at 613 (emphasis added). Thus, the question in *Griffin* was not controlled by *Wilson* precisely because the statute construed in *Wilson* and *Reagan* was just that—a statute—and not a provision of the Constitution. Accordingly, *Griffin* provides no support for the Court's unorthodox contention that *Reagan*'s statutory holding was actually of constitutional dimension.[3]

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[2] The offense charged in *Reagan* was, moreover, a misdemeanor rather than a felony. See 157 U. S., at 304. Even today, our cases recognize a distinction between serious and petty crimes, and we have held that some provisions of the Sixth Amendment do not apply in petty prosecutions. See, *e. g., Lewis* v. *United States*, 518 U. S. 322 (1996) (right to jury trial does not attach in trials for petty offenses). The *Reagan* Court classified the case before it as belonging to the less serious category of offenses and explicitly denied the defendant the heightened procedural protections that attached in trials for more serious crimes. See 157 U. S., at 302–304.

## II

The Court offers two arguments in support of its conclusion that a prosecutor may make the generic tailoring accusations at issue in this case. First, it suggests that such comment has historically not been seen as problematic.

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[3] I do not question the constitutionality of an instruction in which a trial court generally advises the jury that in evaluating the credibility of witnesses, it may take account of the interest of any witness, including the defendant, in the outcome of a case. The interested-witness instruction given in Agard's case was of this variety. The trial court first told the jury that it should consider the interest that any interested witness might have in the outcome. See Tr. 834 ("If you find that any witness is an interested witness, you should consider such interest in determining the credibility of that person's testimony and the weight to be given to it."). It then went on to note, as the Court reports, *ante*, at 73, that the defendant is an interested witness. See Tr. 834. Any instruction generally applicable to witnesses will affect defendants who testify, just as the rules governing the admissibility of testimony at trial will restrict defendants' testimony as they do the testimony of other witnesses. It is a far different matter for an instruction or an argument to impose unique burdens on defendants.

Second, it contends that respondent Agard's case is readily distinguishable from *Griffin.* The Court's historical excursus does not even begin to prove that comments like those in this case have ever been accepted as constitutional, and the attempt to distinguish *Griffin* relies on implausible premises that this Court has previously rejected.

The Court's historical narrative proceeds as follows: In the early days of the Republic, prosecutors had no "need" to suggest that defendants might use their presence at trial to tailor their testimony, because defendants' (unsworn) statements at trial could be compared with pretrial statements that defendants gave as a matter of course. Later, some States instituted rules requiring defendants to testify before the other witnesses did,[4] thus obviating once again any need to make arguments about tailoring. There is no evidence, the Court says, that any State ever prohibited the kind of generic argument now at issue until recent times.[5] So it must be the case that generic tailoring arguments have traditionally been thought unproblematic. *Ante,* at 65–66.

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[4] In *Brooks* v. *Tennessee,* 406 U. S. 605 (1972), we held this practice unconstitutional under the Fifth and Fourteenth Amendments.

[5] In recent years, several state courts have found it improper for prosecutors to make accusations of tailoring based on the defendant's constant attendance at trial. See, *e. g., State* v. *Cassidy,* 236 Conn. 112, 672 A. 2d 899 (1996); *State* v. *Jones,* 580 A. 2d 161, 163 (Me. 1990); *Hart* v. *United States,* 538 A. 2d 1146, 1149 (D. C. 1988); *State* v. *Hemingway,* 148 Vt. 90, 91–92, 528 A. 2d 746, 747–748 (1987); *Commonwealth* v. *Person,* 400 Mass. 136, 138–142, 508 N. E. 2d 88, 90–92 (1987); *State* v. *Johnson,* 80 Wash. App. 337, 908 P. 2d 900 (1996). In *Commonwealth* v. *Elberry,* 38 Mass. App. 912, 645 N. E. 2d 41 (1995), the trial judge sustained defense counsel's objection to a prosecutor's tailoring argument that burdened the defendant's right to be present at trial and issued the following curative instruction: "Of course, the defendant, who was a witness in this case, was here during the testimony of other witnesses, but he's got every right to be here, too. . . . [Y]ou should take everything into consideration in determining credibility, but there is nothing untoward about the defendant being present when other witnesses are testifying." *Id.,* at 913, 645 N. E. 2d, at 43.

I do not comprehend why the Court finds in this account any demonstration that the prosecutorial comment at issue here has a long history of unchallenged use. If prosecutors in times past had no need to make generic tailoring arguments, it is likely such arguments simply were not made. Notably, the Court calls up no instance of an 18th- or 19th-century prosecutor's urging that a defendant's presence at trial facilitated tailored testimony. And if prosecutors did not make such arguments, courts had no occasion to rule them out of order. The absence of old cases prohibiting the comment that the Court now confronts thus scarcely indicates that generic accusations of tailoring have long been considered constitutional.

The Court's discussion of *Griffin* is equally unconvincing. The Court posits that a ban on inviting juries to draw adverse inferences from a defendant's *silence* differs materially from a ban on inviting juries to draw adverse inferences from a defendant's *presence*, because the inference from silence "is *not* . . . 'natural or irresistible.'" See *ante*, at 67 (quoting *Griffin*, 380 U. S., at 615) (emphasis added by majority). This is a startling statement. It fails to convey what the Court actually said in *Griffin*, which was that the inference from silence to guilt is "not *always* so natural or irresistible." See *ibid.* (emphasis added). The statement that an inference is not *always* natural or irresistible implies that the inference is indeed natural or irresistible in many, perhaps most, cases. And so it is. See *Mitchell* v. *United States*, 526 U. S. 314, 332 (1999) (SCALIA, J., dissenting) (The *Griffin* rule "runs exactly counter to normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear."); *Lakeside* v. *Oregon*, 435 U. S. 333, 340 (1978) (It is "very doubtful" that jurors, left to their own devices, would not draw adverse inferences from a defendant's failure to testify.). It is precisely because the inference is often natural (but nonetheless prohibited) that the jury, if a defendant so requests, is instructed not to draw it. *Carter* v. *Kentucky*, 450 U. S. 288, 301–303 (1981) (An uninstructed jury is likely to draw adverse inferences from a defendant's failure to testify, so defendants are entitled to have trial courts instruct juries that no such inference may be drawn.).

The inference involved in *Griffin* is at least as "natural" or "irresistible" as the inference the prosecutor in Agard's case invited the jury to draw. There are, to be sure, reasons why an innocent defendant might not want to testify. Perhaps he fears that his convictions for prior crimes will generate prejudice against him if placed before the jury; perhaps he has an unappealing countenance that could produce the same effect; perhaps he worries that cross-examination will drag into public view prior conduct that, though not unlawful, is deeply embarrassing. For similar reasons, an innocent person might choose to remain silent after arrest. But in either the *Griffin* scenario of silence at trial or the *Doyle* scenario of silence after arrest, something beyond the simple innocence of the defendant must be hypothesized in order to explain the defendant's behavior.

Not so in the present case. If a defendant appears at trial and gives testimony that fits the rest of the evidence, sheer innocence could explain his behavior completely. The inference from silence to guilt in *Griffin* or from silence to untrustworthiness in *Doyle* is thus more direct than the inference from presence to tailoring.[6] Unless one has prejudged the defendant as guilty, or unless there are specific reasons to believe that particular testimony has been altered, the possibility that the defendant is telling the truth is surely as good an explanation for the coherence of the defendant's testimony as any that involves wrongful tailoring. I therefore disagree with the Court's assertion, *ante,* at 68, that the Court of Appeals' decision in Agard's case differs from our decision in *Griffin* by "requir[ing] the jury to do what is practically impossible."[7] It makes little sense to maintain that juries able to avoid drawing adverse inferences from a defendant's silence would be unable to avoid thinking that only a defendant's opportunity to spin a web of lies could explain the seamlessness of his testimony.

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[6] The Court describes the inference now at issue as one not from presence to tailoring but merely from presence to *opportunity* to tailor. *Ante*, at 71, n. 2. The proposition that Agard simply had the opportunity to tailor, we note, is not what the prosecutor urged upon the jury. She encouraged the jury to draw, from the *fact* of Agard's opportunity, the *inference* that he had actually tailored his testimony. See App. 49 (Defendant was able "to sit here and listen to the testimony of all the other witnesses before he testifie[d]. . . . [He got] to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence? . . . He's a smart man. . . . He used everything to his advantage.")

The Court states in the alternative that if proscribing generic accusations of tailoring at summation does not require the jury to do the impossible, then it prohibits prosecutors from "inviting the jury to do what the jury is perfectly entitled to do." *Ante,* at 68. The Court offers no prior authority, however, for the proposition that a jury may constitutionally draw the inference now at issue. The Second Circuit thought the matter open, and understandably so in light of *Griffin* and *Carter.* But even if juries were permitted to draw the inference in question, it would not follow that prosecutors could urge juries to draw it. *Doyle* prohibits prosecutors from urging juries to draw adverse inferences from a defendant's choice to remain silent after receiving *Miranda* warnings, but the Court today shows no readiness to say that juries may not draw that inference themselves. See *ante,* at 74–75. It therefore seems unproblematic to hold that a prosecutor's latitude for argument is narrower than a jury's latitude for assessment.

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[7] In fact, the Court of Appeals' decision in Agard's case does not tell juries to do *anything;* it merely prevents prosecutors from inviting them to do something. I presume that the Court means to say that the Court of Appeals' decision prohibits prosecutors from inviting juries to do something jurors will inevitably do even without invitation. In either case, however, the Court's confidence that all juries will naturally regard the defendant's presence at trial as a reason to be suspicious of his testimony is perplexing in light of the Court's equal confidence that allowing comment on the same subject is "essential" to the truth-finding function of the trial. See *ante,* at 73. If all juries think this anyway, the pursuit of truth will not suffer if they are not told to think it.

In its final endeavor to distinguish the two inferences, the Court maintains that the one in *Griffin* goes to a defendant's guilt but the one now at issue goes merely to a defendant's credibility as a witness. See *ante,* at 69. But it is dominantly in cases where the physical evidence is inconclusive that prosecutors will concentrate all available firepower on the credibility of a testifying defendant. Argument that goes to the defendant's credibility in such a case also goes to guilt. Indeed, the first sentence of the Court's account of the trial in this case acknowledges that the questions of guilt and credibility were coextensive. See *ante,* at 63 (Agard's trial "ultimately came down to a credibility determination.").

The Court emphasizes that a prosecutor may make an issue of a defendant's credibility, and it points for support to our decisions in *Jenkins* v. *Anderson,* 447 U. S. 231 (1980), and *Brooks* v. *Tennessee,* 406 U. S. 605 (1972). See *ante,* at 69–70. But again, the distinction between cross-examination and summation is critical. Cross-examination is the criminal trial's primary means of contesting the credibility of any witness, and a defendant who is also a witness may of course be cross-examined. *Jenkins* supports the proposition that cross-examination is of sufficient value as an aid to finding truth at trial that prosecutors may sometimes question defendants even about matters that may touch on their constitutional rights, and *Brooks* suggests that cross-examination can expose a defendant who tailors his testimony. See *Jenkins,* 447 U. S., at 233, 238; *Brooks,* 406 U. S., at 609–612. Thus the prosecutor's tactics in *Jenkins* and our own counsel in *Brooks* are entirely consistent with the moderate restriction on prosecutorial license that the Court today rejects.

* * *

In the end, we are left with a prosecutorial practice that burdens the constitutional rights of defendants, that cannot be justified by reference to the trial's aim of sorting guilty defendants from innocent ones, and that is not supported by our case law. The restriction that the Court of Appeals placed on generic accusations of tailoring is both moderate and warranted. That court declared it permissible for the prosecutor to comment on "what the defendant testified to regarding pertinent events"—"the fit between the testimony of the defendant and other witnesses." 159 F. 3d, at 99. What is impermissible, the Second Circuit held, is simply and only a summation "bolstering . . . the prosecution witnesses' credibility vis-a-vis the defendant's based solely on the defendant's exercise of a constitutional right to be present during the trial." *Ibid.* I would affirm that sound judgment and therefore dissent from the Court's disposition.

# UNITED STATES *v.* LOCKE, GOVERNOR OF WASHINGTON, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–1701. Argued December 7, 1999—Decided March 6, 2000*

After the supertanker *Torrey Canyon* spilled crude oil off the coast of England in 1967, both Congress, in the Ports and Waterways Safety Act of 1972 (PWSA), and the State of Washington enacted more stringent regulations for tankers and provided for more comprehensive remedies in the event of an oil spill. The ensuing question of federal pre-emption of the State's laws was addressed in *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151. In 1989, the supertanker *Exxon Valdez* ran aground in Alaska, causing the largest oil spill in United States history. Again, both Congress and Washington responded. Congress enacted the Oil Pollution Act of 1990 (OPA). The State created a new agency and directed it to establish standards to provide the "best achievable protection" (BAP) from oil spill damages. That agency promulgated tanker design, equipment, reporting, and operating requirements. Petitioner International Association of Independent Tanker Owners (Intertanko), a trade association of tanker operators, brought this suit seeking declaratory and injunctive relief against state and local officials responsible for enforcing the BAP regulations. Upholding the regulations, the District Court rejected Intertanko's arguments that the BAP standards invaded an area long pre-empted by the Federal Government. At the appeal stage, the United States intervened on Intertanko's behalf, contending that the District Court's ruling failed to give sufficient weight to the substantial foreign affairs interests of the Federal Government. The Ninth Circuit held that the State could enforce its laws, save one requiring vessels to install certain navigation and towing equipment, which was "virtually identical to" requirements declared pre-empted in *Ray*.

*Held:* Washington's regulations regarding general navigation watch procedures, crew English language skills and training, and maritime casualty reporting are pre-empted by the comprehensive federal regulatory scheme governing oil tankers; these cases are remanded so the

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*Together with No. 98–1706, *International Association of Independent Tanker Owners (Intertanko)* v. *Locke, Governor of Washington, et al.*, also on certiorari to the same court.

validity of other Washington regulations may be assessed in light of the considerable federal interest at stake. Pp. 99–117.

(a) The State has enacted legislation in an area where the federal interest has been manifest since the beginning of the Republic and is now well established. Congress has, beginning with the Tank Vessel Act of 1936, enacted a series of statutes pertaining to maritime tanker transports. These include the PWSA, Title I of which authorizes, but does not require, the Coast Guard to enact measures for controlling vessel traffic or for protecting navigation and the marine environment, 33 U. S. C. § 1223(a), and Title II of which, as amended, requires the Coast Guard to issue regulations addressing the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of covered vessels, 46 U. S. C. § 3703(a). Congress later enacted OPA, Title I of which, among other things, imposes liability for both removal costs and damages on parties responsible for an oil spill, 33 U. S. C. § 2702, and includes two saving clauses preserving the States' authority to impose additional liability, requirements, and penalties, §§ 2718(a) and (c). Congress has also ratified international agreements in this area, including the International Convention of Standards of Training Certification and Watchkeeping for Seafarers (STCW). Pp. 99–103.

(b) In *Ray*, the Court held that the PWSA and Coast Guard regulations promulgated under that Act pre-empted Washington's pilotage requirement, limitation on tanker size, and tanker design and construction rules. The *Ray* Court's interpretation of the PWSA is correct and controlling here. Its basic analytic structure explains why federal preemption analysis applies to the challenged regulations and allows scope and due recognition for the traditional authority of the States and localities to regulate some matters of local concern. In narrowing the preemptive effect given the PWSA in *Ray*, the Ninth Circuit placed more weight on OPA's saving clauses than they can bear. Like Title I of OPA, in which they are found, the saving clauses are limited to regulations governing liability and compensation for oil pollution, and do not extend to rules regulating vessel operation, design, or manning. Thus, the pre-emptive effect of the PWSA and its regulations is not affected by OPA, and *Ray*'s holding survives OPA's enactment undiminished. The *Ray* Court's prefatory observation that an "assumption" that the States' historic police powers were not to be superseded by federal law unless that was the clear and manifest congressional purpose does not mean that a presumption against pre-emption aids the Court's analysis here. An assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence. The *Ray* Court held, among other things, that Congress, in PWSA Title I, preserved state authority to regulate the peculiarities of local waters, such as depth and narrowness, if there is no conflict with federal regulatory determinations, see 435 U. S., at 171–172, 178, but further held that Congress, in PWSA Title II, mandated uniform federal rules on the subjects or matters there specified, *id.*, at 168. Thus, under *Ray's* interpretation of the Title II provision now found at 46 U. S. C. § 3703(a), only the Federal Government may regulate the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tankers. The Court today reaffirms *Ray's* holding on this point. Congress has left no room for state regulation of these matters. See *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U. S. 141. Although the *Ray* Court acknowledged that the existence of some overlapping coverage between the two PWSA titles may make it difficult to determine whether a pre-emption question is controlled by conflict pre-emption principles, applicable generally to Title I, or by field pre-emption rules, applicable generally to Title II, the Court declined to resolve every question by the greater pre-emptive force of Title II. Thus, conflict pre-emption will be applicable in some, although not all, cases. Useful inquiries in determining which title governs include whether the regulation in question is justified by conditions unique to a particular port or waterway, see *Ray,* 435 U. S., at 175, or whether it is of limited extraterritorial effect, not requiring the tanker to modify its primary conduct outside the specific body of water purported to justify the local rule, see *id.*, at 159–160, 171. Pp. 103–112.

(c) The field pre-emption rule surrounding PWSA Title II and 46 U. S. C. § 3703(a) and the superseding effect of additional federal statutes are illustrated by the pre-emption of four of Washington's tanker regulations, the attempted reach of which is well demonstrated by the briefs and record. First, the imposition of a series of training requirements on a tanker's crew does not address matters unique to Washington waters, but imposes requirements that control the staffing, operation, and manning of a tanker outside of those waters. The training and drill requirements pertain to "operation" and "personnel qualifications" and so are pre-empted by § 3703(a). That training is a field reserved to the Federal Government is further confirmed by the circumstance that the STCW Convention addresses crew "training" and "qualification" requirements, and that the United States has enacted crew training regulations. Second, the imposition of English language proficiency requirements on a tanker's crew is not limited to governing local traffic or local peculiarities. It is pre-empted by § 3703(a) as a "personnel qualification" and by 33 U. S. C. § 1228(a)(7), which requires that any vessel operating in United States waters have at least one licensed deck officer on the navigation bridge who is capable of clearly understanding English. Third, Washington's general requirement that the navigation watch consist of at least two licensed deck officers, a helmsman, and a lookout is pre-empted as an attempt to regulate a tanker's "operation" and "manning" under 46 U. S. C. § 3703(a). Fourth, the requirement that vessels in Washington waters report certain marine casualties regardless of where in the world they occurred cannot stand in light of Coast Guard regulations on the same subject that Congress intended be the sole source of a vessel's reporting obligations, see §§ 6101, 3717(a)(4). On remand, Washington may argue that certain of its regulations, such as its watch requirement in times of restricted visibility, are of limited extraterritorial effect, are necessary to address the peculiarities of Puget Sound, and therefore are not subject to Title II field pre-emption, but should instead be evaluated under Title I conflict pre-emption analysis. Pp. 112–116.

(d) It is preferable that petitioners' substantial arguments as to pre-emption of the remaining Washington regulations be considered by the Ninth Circuit or by the District Court within the framework this Court has herein discussed. The United States did not participate in these cases until appeal, and resolution of the litigation would benefit from the development of a full record by all interested parties. If, pending adjudication on remand, Washington threatens to begin enforcing its regulations, the lower courts would weigh any stay application under the appropriate legal standards in light of the principles discussed herein and with recognition of the national interests at stake. Ultimately, it is largely for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate. States, as well as environmental groups and local port authorities, will participate in the process. See § 3703(a). Pp. 116–117.

148 F. 3d 1053, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

*David C. Frederick* argued the cause for the United States in No. 98–1701. With him on the briefs were *Solicitor General Waxman, Acting Assistant Attorney General Ogden, Deputy Solicitor General Kneedler, Douglas N. Letter, Michael Jay Singer, H. Thomas Byron III, David R. Andrews, Judith Miller, Nancy E. McFadden, Paul M. Geier, Dale C. Andrews, James S. Carmichael, Malcolm J. Williams, Jr.,* and *Paul M. Wasserman*. *C. Jonathan Benner* argued the cause for petitioner in No. 98–1706. With him on the briefs were *Timi E. Nickerson* and *Sean T. Connaughton.*

*William Berggren Collins,* Senior Assistant Attorney General of Washington, argued the cause for respondents in both cases. With him on the brief for the state respondents were *Christine O. Gregoire,* Attorney General, and *Jay D. Geck, Thomas C. Morrill,* and *Jerri Lynn Thomas,* Assistant Attorneys General. *Jeffrey L. Needle* filed a brief for respondent Washington Environmental Council et al. With him on the brief was *John M. MacDonald.*†

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†Briefs of *amici curiae* urging reversal were filed for the Government of Belgium et al. by *Alex Blanton* and *Laurie C. Sahatjian;* for the American Waterways Operators by *Eldon V. C. Greenberg* and *Barbara L. Holland;* for the Baltic and International Maritime Council et al. by *Dennis L. Bryant, Charles L. Coleman III, Brian D. Starer,* and *Jovi Tenev;* for the International Chamber of Shipping et al. by *William F. Sheehan, John Townsend Rich,* and *Heather H. Anderson;* for the Maritime Law Association of the United States by *Howard M. McCormack, James Patrick Cooney,* and *David J. Bederman;* for the National Association of Waterfront Employers et al. by *F. Edwin Froelich* and *Charles T. Carroll, Jr.;* for the Product Liability Advisory Council, Inc., et al. by *Kenneth S. Geller, Charles Rothfeld,* and *Robin S. Conrad;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *R. Shawn Gunnarson.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *Richard M. Frank,* Chief Assistant Attorney General, *Mary E. Hackenbracht* and *J. Matthew Rodriquez,* Assistant Attorneys General, *Dennis M. Eagan* and *Michael W. Neville,* Deputy Attorneys General, *Maya B. Kara,* Acting Attorney General of the Northern Mariana Islands, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *Thomas F. Reilly* of Massachusetts, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.,* of New Jersey, *Eliot Spitzer* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Sheldon Whitehouse* of Rhode Island, *Charlie Condon* of South Carolina, and *Jan Graham* of Utah; for San Juan County, Washington, et al. by *Randall K. Gaylord* and *Karen*

JUSTICE KENNEDY delivered the opinion of the Court.

The maritime oil transport industry presents ever-present, all too real dangers of oil spills from tanker ships, spills which could be catastrophes for the marine environment. After the supertanker *Torrey Canyon* spilled its cargo of 120,000 tons of crude oil off the coast of Cornwall, England, in 1967, both Congress and the State of Washington enacted more stringent regulations for these tankers and provided for more comprehensive remedies in the event of an oil spill. The ensuing question of federal pre-emption of the State's laws was addressed by the Court in *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978).

In 1989, the supertanker *Exxon Valdez* ran aground in Prince William Sound, Alaska, and its cargo of more than 53 million gallons of crude oil caused the largest oil spill in United States history. Again, both Congress and the State of Washington responded. Congress enacted new statutory provisions, and Washington adopted regulations governing tanker operations and design. Today we must determine whether these more recent state laws can stand despite the comprehensive federal regulatory scheme governing oil tankers. Relying on the same federal statute that controlled the analysis in *Ray*, we hold that some of the State's regulations are pre-empted; as to the balance of the regulations, we remand the case so their validity may be assessed in light of the considerable federal interest at stake and in conformity with the principles we now discuss.

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*E. Vedder;* and for the Steamship Association of Southern California by *David E. R. Woolley* and *Thomas A. Russell.*

Briefs of *amici curiae* were filed for the Government of Canada by *Margaret K. Pfeiffer;* for the Pacific Coast Federation of Fishermen's Associations et al. by *Bryan P. Coluccio;* for the Pacific Merchant Shipping Association by *Sam D. Delich* and *James B. Nebel;* for the Prince William Sound Regional Citizens' Advisory Council by *Avrum M. Gross* and *Susan A. Burke;* and for the Puget Sound Steamship Operators Association et al. by *Richard W. Buchanan* and *Robert W. Nolting.*

## I

The State of Washington embraces some of the Nation's most significant waters and coastal regions. Its Pacific Ocean seacoast consists, in large part, of wave-exposed rocky headlands separated by stretches of beach. Washington borders as well on the Columbia River estuary, dividing Washington from Oregon. Two other large estuaries, Grays Harbor and Willapa Bay, are also within Washington's waters. Of special significance in these cases is the inland sea of Puget Sound, a 2,500 square mile body of water consisting of inlets, bays, and channels. More than 200 islands are located within the sound, and it sustains fisheries and plant and animal life of immense value to the Nation and to the world.

Passage from the Pacific Ocean to the quieter Puget Sound is through the Strait of Juan de Fuca, a channel 12 miles wide and 65 miles long which divides Washington from the Canadian Province of British Columbia. The international boundary is located midchannel. Access to Vancouver, Canada's largest port, is through the strait. Traffic inbound from the Pacific Ocean, whether destined to ports in the United States or Canada, is routed through Washington's waters; outbound traffic, whether from a port in Washington or Vancouver, is directed through Canadian waters. The pattern had its formal adoption in a 1979 agreement entered into by the United States and Canada. Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, 32 U. S. T. 377, T. I. A. S. No. 9706.

In addition to holding some of our vital waters, Washington is the site of major installations for the Nation's oil industry and the destination or shipping point for huge volumes of oil and its end products. Refineries and product terminals are located adjacent to Puget Sound in ports including Cherry Point, Ferndale, Tacoma, and Anacortes. Canadian refineries are found near Vancouver on Burrard Inlet and the lower Fraser River. Crude oil is transported by sea to

Puget Sound. Most is extracted from Alaska's North Slope reserve and is shipped to Washington on United States flag vessels. Foreign-flag vessels arriving from nations such as Venezuela and Indonesia also call at Washington's oil installations.

The bulk of oil transported on water is found in tankers, vessels which consist of a group of tanks contained in a ship-shaped hull, propelled by an isolated machinery plant at the stern. The Court described the increase in size and numbers of these ships close to three decades ago in *Askew* v. *American Waterways Operators, Inc.*, 411 U. S. 325, 335 (1973), noting that the average vessel size increased from 16,000 tons during World War II to 76,000 tons in 1966. (The term "tons" refers to "deadweight tons," a way of measuring the cargo-carrying capacity of the vessels.) Between 1955 and 1968, the world tanker fleet grew from 2,500 vessels to 4,300. *Ibid.* By December 1973, 366 tankers in the world tanker fleet were in excess of 175,000 tons, see 1 M. Tusiani, The Petroleum Shipping Industry 79 (1996), and by 1998 the number of vessels considered "tankers" in the merchant fleets of the world numbered 6,739, see U. S. Dept. of Transp., Maritime Administration, Merchant Fleets of the World 1 (Oct. 1998).

The size of these vessels, the frequency of tanker operations, and the vast amount of oil transported by vessels with but one or two layers of metal between the cargo and the water present serious risks. Washington's waters have been subjected to oil spills and further threatened by near misses. In December 1984, for example, the tanker ARCO Anchorage grounded in Port Angeles Harbor and spilled 239,000 gallons of Alaskan crude oil. The most notorious oil spill in recent times was in Prince William Sound, Alaska, where the grounding of the *Exxon Valdez* released more than 11 million gallons of crude oil and, like the *Torrey Canyon* spill before it, caused public officials intense concern over the threat of a spill.

Washington responded by enacting the state regulations now in issue. The legislature created the Office of Marine Safety, which it directed to establish standards for spill prevention plans to provide "the best achievable protection [BAP] from damages caused by the discharge of oil." Wash. Rev. Code § 88.46.040(3) (1994). The Office of Marine Safety then promulgated the tanker design, equipment, reporting, and operating requirements now subject to attack by petitioners. Wash. Admin. Code (WAC) § 317–21–130 *et seq.* (1999). A summary of the relevant regulations, as described by the Court of Appeals, is set out in the Appendix, *infra.*

If a vessel fails to comply with the Washington rules, possible sanctions include statutory penalties, restrictions of the vessel's operations in state waters, and a denial of entry into state waters. Wash. Rev. Code §§ 88.46.070, 88.46.080, 88.46.090 (1994).

Petitioner International Association of Independent Tanker Owners (Intertanko) is a trade association whose 305 members own or operate more than 2,000 tankers of both United States and foreign registry. The organization represents approximately 80% of the world's independently owned tanker fleet; and an estimated 60% of the oil imported into the United States is carried on Intertanko vessels. The association brought this suit seeking declaratory and injunctive relief against state and local officials responsible for enforcing the BAP regulations. Groups interested in environmental preservation intervened in defense of the laws. Intertanko argued that Washington's BAP standards invaded areas long occupied by the Federal Government and imposed unique requirements in an area where national uniformity was mandated. Intertanko further contended that if local political subdivisions of every maritime nation were to impose differing regulatory regimes on tanker operations, the goal of national governments to develop effective international environmental and safety standards would be defeated.

Although the United States declined to intervene when the case was in the District Court, the governments of 13 ocean-going nations expressed concerns through a diplomatic note directed to the United States. Intertanko lodged a copy of the note with the District Court. The concerned governments represented that "legislation by the State of Washington on tanker personnel, equipment and operations would cause inconsistency between the regulatory regime of the US Government and that of an individual State of the US. Differing regimes in different parts of the US would create uncertainty and confusion. This would also set an unwelcome precedent for other Federally administered countries." Note Verbale from the Royal Danish Embassy to the U. S. Dept. of State 1 (June 14, 1996).

The District Court rejected all of Intertanko's arguments and upheld the state regulations. *International Assn. of Independent Tanker Owners (Intertanko)* v. *Lowry*, 947 F. Supp. 1484 (WD Wash. 1996). The appeal followed, and at that stage the United States intervened on Intertanko's behalf, contending that the District Court's ruling failed to give sufficient weight to the substantial foreign affairs interests of the Federal Government. The United States Court of Appeals for the Ninth Circuit held that the State could enforce its laws, save the one requiring the vessels to install certain navigation and towing equipment. 148 F. 3d 1053 (1998). The Court of Appeals reasoned that this requirement, found in WAC § 317–21–265, was "virtually identical to" requirements declared pre-empted in *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978). 148 F. 3d, at 1066. Over Judge Graber's dissent, the Court of Appeals denied petitions for rehearing en banc. 159 F. 3d 1220 (1998). Judge Graber, although unwilling, without further analysis, to conclude that the panel reached the wrong result, argued that the opinion was "incorrect in two exceptionally important respects: (1) The opinion places too much weight on two clauses in Title I of OPA 90 [The Oil Pollution Act of 1990] that limit OPA 90's preemptive effect. (2) Portions of the opinion that discuss the Coast Guard regulations are inconsistent with Ninth Circuit and Supreme Court precedent." *Id.*, at 1221. We granted certiorari and now reverse. 527 U. S. 1063 (1999).

## II

The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution. *E. g.*, The Federalist Nos. 44, 12, 64. In 1789, the First Congress enacted a law by which vessels with a federal certificate were entitled to "the benefits granted by any law of the United States." Act of Sept. 1, 1789, ch. 11, § 1, 1 Stat. 55. The importance of maritime trade and the emergence of maritime transport by steamship resulted in further federal licensing requirements enacted to promote trade and to enhance the safety of crew members and passengers. See Act of July 7, 1838, ch. 191, 5 Stat. 304; Act of Mar. 3, 1843, ch. 94, 5 Stat. 626. In 1871, Congress enacted a comprehensive scheme of regulation for steam powered vessels, including provisions for licensing captains, chief mates, engineers, and pilots. Act of Feb. 28, 1871, ch. 100, 16 Stat. 440.

The Court in *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852), stated that there would be instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority, although in the case before it the Court found the challenged state regulations were permitted in light of local needs and conditions. Where Congress had acted, however, the Court had little difficulty in finding state vessel requirements were pre-empted by federal laws which governed the certification of vessels and standards of operation. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), invalidated a New York law that attempted to grant a monopoly to operate steamboats on the ground it was inconsistent with the coasting license held by the vessel owner challenging the exclusive franchise. And in *Sinnot* v. *Davenport,* 22 How. 227 (1859), the Court decided that the federal license held by the vessel contained "the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade." *Id.,* at 241. The Court went on to explain that in such a circumstance, state laws on the subject must yield: "In every such case, the act of Congress or treaty is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.,* at 243.

Against this background, Congress has enacted a series of statutes pertaining to maritime tanker transports and has ratified international agreements on the subject. We begin by referring to the principal statutes and international instruments discussed by the parties.

### *1. The Tank Vessel Act.*

The Tank Vessel Act of 1936, 49 Stat. 1889, enacted specific requirements for operation of covered vessels. The Act provided that "[i]n order to secure effective provisions against the hazards of life and property," additional federal rules could be adopted with respect to the "design and construction, alteration, or repair of such vessels," "the operation of such vessels," and "the requirements of the manning of such vessels and the duties and qualifications of the officers and crews thereof." The purpose of the Act was to establish "a reasonable and uniform set of rules and regulations concerning . . . vessels carrying the type of cargo deemed dangerous." H. R. Rep. No. 2962, 74th Cong., 2d Sess., 2 (1936). The Tank Vessel Act was the primary source for regulating tank vessels for the next 30 years, until the *Torrey Canyon* grounding led Congress to take new action.

*2. The Ports and Waterways Safety Act of 1972.*

Responding to the *Torrey Canyon* spill, Congress enacted the Ports and Waterways Safety Act of 1972 (PWSA). The Act, as amended by the Port and Tanker Safety Act of 1978, 92 Stat. 1471, contains two somewhat overlapping titles, both of which may, as the *Ray* Court explained, preclude enforcement of state laws, though not by the same pre-emption analysis. Title I concerns vessel traffic "in any port or place under the jurisdiction of the United States." 110 Stat. 3934, 33 U. S. C. § 1223(a)(1) (1994 ed., Supp. III). Under Title I, the Coast Guard may enact measures for controlling vessel traffic or for protecting navigation and the marine environment, but it is not required to do so. *Ibid.*

Title II does require the Coast Guard to issue regulations, regulations addressing the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels . . . that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment." 46 U. S. C. § 3703(a).

The critical provisions of the PWSA described above remain operative, but the Act has been amended, most significantly by the Oil Pollution Act of 1990 (OPA), 104 Stat. 484. OPA, enacted in response to the *Exxon Valdez* spill, requires separate discussion.

*3. The Oil Pollution Act of 1990.*

The OPA contains nine titles, two having the most significance for these cases. Title I is captioned "Oil Pollution Liability, and Compensation" and adds extensive new provisions to the United States Code. See 104 Stat. 2375, 33 U. S. C. § 2701 *et seq.* (1994 ed. and Supp. III). Title I imposes liability (for both removal costs and damages) on parties responsible for an oil spill. § 2702. Other provisions provide defenses to, and limitations on, this liability. 33 U. S. C. §§ 2703, 2704. Of considerable importance to these cases are OPA's saving clauses, found in Title I of the Act, § 2718, and to be discussed below.

Title IV of OPA is entitled "Prevention and Removal." For the most part, it amends existing statutory provisions or instructs the Secretary of Transportation (whose departments include the Coast Guard) to take action under previous grants of rulemaking authority. For example, Title IV instructs the Coast Guard to require reporting of marine casualties resulting in a "significant harm to the environment." 46 U. S. C. § 6101(a)(5) (1994 ed. and Supp. V). Title IV further requires the Secretary to issue regulations to define those areas, including Puget Sound, on which single hulled tankers shall be escorted by other vessels. 104 Stat. 523. By incremental dates specified in the Act, all covered tanker vessels must have a double hull. 46 U. S. C. § 3703a.

### *4. Treaties and International Agreements.*

The scheme of regulation includes a significant and intricate complex of international treaties and maritime agreements bearing upon the licensing and operation of vessels. We are advised by the United States that the international regime depends upon the principle of reciprocity. That is to say, the certification of a vessel by the government of its own flag nation warrants that the ship has complied with international standards, and vessels with those certificates may enter ports of the signatory nations. Brief for United States 3.

Illustrative of treaties and agreements to which the United States is a party are the International Convention for the Safety of Life at Sea, 1974, 32 U. S. T. 47, T. I. A. S. No. 9700, the International Convention for Prevention of Pollution from Ships, 1973, S. Exec. Doc. C, 93–1, 12 I. L. M. 1319, as amended by 1978 Protocol, S. Exec. Doc. C, 96–1, 17

I. L. M. 546, and the International Convention of Standards of Training, Certification and Watchkeeping for Seafarers, With Annex, 1978 (STCW), S. Exec. Doc. EE, 96–1, C. T. I. A. No. 7624.

The United States argues that these treaties, as the supreme law of the land, have pre-emptive force over the state regulations in question here. We need not reach that issue at this stage of the case because the state regulations we address in detail below are pre-empted by federal statute and regulations. The existence of the treaties and agreements on standards of shipping is of relevance, of course, for these agreements give force to the longstanding rule that the enactment of a uniform federal scheme displaces state law, and the treaties indicate Congress will have demanded national uniformity regarding maritime commerce. See *Ray*, 435 U. S., at 166 (recognizing Congress anticipated "arriving at international standards for building tank vessels" and understanding "the Nation was to speak with one voice" on these matters). In later proceedings, if it is deemed necessary for full disposition of the case, it should be open to the parties to argue whether the specific international agreements and treaties are of binding, pre-emptive force. We do not reach those questions, for it may be that pre-emption principles applicable to the basic federal statutory structure will suffice, upon remand, for a complete determination.

## III

In *Ray* v. *Atlantic Richfield, supra,* the Court was asked to review, in light of an established federal and international regulatory scheme, comprehensive tanker regulations imposed by the State of Washington. The Court held that the PWSA and Coast Guard regulations promulgated under that Act pre-empted a state pilotage requirement, Washington's limitation on tanker size, and tanker design and construction rules.

In these cases, petitioners relied on *Ray* to argue that Washington's more recent state regulations were preempted as well. The Court of Appeals, however, concluded that *Ray* retained little validity in light of subsequent action by Congress. We disagree. The *Ray* Court's interpretation of the PWSA is correct and controlling. Its basic analytic structure explains why federal pre-emption analysis applies to the challenged regulations and allows scope and due recognition for the traditional authority of the States and localities to regulate some matters of local concern.

At the outset, it is necessary to explain that the essential framework of *Ray,* and of the PWSA which it interpreted, are of continuing force, neither having been superseded by subsequent authority relevant to these cases. In narrowing the pre-emptive effect given the PWSA in *Ray,* the Court of Appeals relied upon OPA's saving clauses, finding in their language a return of authority to the States. Title I of OPA contains two saving clauses, stating:

> "(a) Preservation of State authorities . . .
>
> "Nothing in this Act or the Act of March 3, 1851 shall—
>
> "(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
>
> "(A) the discharge of oil or other pollution by oil within such State . . . .
>
> . . . . .
>
> "(c) Additional requirements and liabilities; penalties
>
> "Nothing in this Act, the Act of March 3, 1851 (46 U. S. C. 183 et seq.), or section 9509 of [the Internal Revenue Code of 1986 (26 U. S. C. 9509)], shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

> "(1) to impose additional liability or additional requirements
>
> . . . . .
>
> "relating to the discharge, or substantial threat of a discharge, of oil." 33 U. S. C. § 2718.

The Court of Appeals placed more weight on the saving clauses than those provisions can bear, either from a textual standpoint or from a consideration of the whole federal regulatory scheme of which OPA is but a part.

The saving clauses are found in Title I of OPA, captioned Oil Pollution Liability and Compensation and creating a liability scheme for oil pollution. In contrast to the Washington rules at issue here, Title I does not regulate vessel operation, design, or manning. Placement of the saving clauses in Title I of OPA suggests that Congress intended to preserve state laws of a scope similar to the matters contained in Title I of OPA, not all state laws similar to the matters covered by the whole of OPA or to the whole subject of maritime oil transport. The evident purpose of the saving clauses is to preserve state laws which, rather than imposing substantive regulation of a vessel's primary conduct, establish liability rules and financial requirements relating to oil spills. See *Gutierrez* v. *Ada*, 528 U. S. 250, 255 (2000) (words of a statute should be interpreted consistent with their neighbors to avoid giving unintended breadth to an Act of Congress).

Our conclusion is fortified by Congress' decision to limit the saving clauses by the same key words it used in declaring the scope of Title I of OPA. Title I of OPA permits recovery of damages involving vessels "from which oil is discharged, or which pos[e] the substantial threat of a discharge of oil." 33 U. S. C. § 2702(a). The saving clauses, in parallel manner, permit States to impose liability or requirements "relating to the discharge, or substantial threat of a discharge, of oil." § 2718(c). In its titles following Title I, OPA addresses matters including licensing and certificates of registry, 104 Stat.

509; duties of senior licensed officers to relieve the master, *id.*, at 511; manning standards for foreign vessels, *id.*, at 513; reporting of marine casualties, *ibid.;* minimum standards for plating thickness, *id.*, at 515; tank vessel manning requirements, *id.*, at 517; and tank vessel construction standards, *id.*, at 517–518, among other extensive regulations. If Congress had intended to disrupt national uniformity in all of these matters, it would not have done so by placement of the saving clauses in Title I.

The saving clauses are further limited in effect to "this Act, the Act of March 3, 1851 . . . , or section 9509 of [the Internal Revenue Code]." §§2718(a) and (c). These explicit qualifiers are inconsistent with interpreting the saving clauses to alter the pre-emptive effect of the PWSA or regulations promulgated thereunder. The text of the statute indicates no intent to allow States to impose wide-ranging regulation of the at-sea operation of tankers. The clauses may preserve a State's ability to enact laws of a scope similar to Title I, but do not extend to subjects addressed in the other titles of the Act or other acts.

Limiting the saving clauses as we have determined respects the established federal-state balance in matters of maritime commerce between the subjects as to which the States retain concurrent powers and those over which the federal authority displaces state control. We have upheld state laws imposing liability for pollution caused by oil spills. See *Askew* v. *American Waterways Operators, Inc.*, 411 U. S., at 325. Our view of OPA's saving clauses preserves this important role for the States, which is unchallenged here. We think it quite unlikely that Congress would use a means so indirect as the saving clauses in Title I of OPA to upset the settled division of authority by allowing States to impose additional unique substantive regulation on the at-sea conduct of vessels. We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law. See, *e. g.*, *Morales*

v. *Trans World Airlines, Inc.*, 504 U. S. 374, 385 (1992); *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U. S. 214, 227–228 (1998).

From the text of OPA and the long-established understanding of the appropriate balance between federal and state regulation of maritime commerce, we hold that the pre-emptive effect of the PWSA and regulations promulgated under it are not affected by OPA. We doubt Congress will be surprised by our conclusion, for the Conference Report on OPA shared our view that the statute "does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978)." H. R. Conf. Rep. No. 101–653, p. 122 (1990). The holding in *Ray* also survives the enactment of OPA undiminished, and we turn to a detailed discussion of that case.

As we mentioned above, the *Ray* Court confronted a claim by the operator of a Puget Sound refinery that federal law precluded Washington from enforcing laws imposing certain substantive requirements on tankers. The *Ray* Court prefaced its analysis of the state regulations with the following observation:

> "The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)." 435 U. S., at 157.

The fragmentary quote from *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), does not support the scope given to it by the Court of Appeals or by respondents.

*Ray* quoted but a fragment of a much longer paragraph found in *Rice*. The quoted fragment is followed by extensive and careful qualifications to show the different approaches taken by the Court in various contexts. We need not discuss that careful explanation in detail, however. To explain the full intent of the *Rice* quotation, it suffices to quote in full the sentence in question and two sentences preceding it. The *Rice* opinion stated: "The question in each case is what the purpose of Congress was. Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U. S., at 230 (citations omitted).

The qualification given by the word "so" and by the preceding sentences in *Rice* are of considerable consequence. As *Rice* indicates, an "assumption" of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence. See also *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977) ("assumption" is triggered where "the field which Congress is said to have pre-empted has been traditionally occupied by the States"); *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) (citing *Rice* in case involving medical negligence, a subject historically regulated by the States). In *Ray*, and in the case before us, Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme.

The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce. No artificial presumption aids us in determining the scope of appropriate local regulation under the PWSA, which, as we discuss below, does preserve, in Title I of that Act, the historic role of the States to regulate local ports and waters under appropriate circumstances. At the same time, as we also discuss below, uniform, national rules regarding general tanker design, operation, and seaworthiness have been mandated by Title II of the PWSA.

The *Ray* Court confirmed the important proposition that the subject and scope of Title I of the PWSA allows a State to regulate its ports and waterways, so long as the regulation is based on "the peculiarities of local waters that call for special precautionary measures." 435 U. S., at 171. Title I allows state rules directed to local circumstances and problems, such as water depth and narrowness, idiosyncratic to a particular port or waterway. *Ibid.* There is no pre-emption by operation of Title I itself if the state regulation is so directed and if the Coast Guard has not adopted regulations on the subject or determined that regulation is unnecessary or inappropriate. This principle is consistent with recognition of an important role for States and localities in the regulation of the Nation's waterways and ports. *E. g., Cooley,* 12 How., at 319 (recognizing state authority to adopt plans "applicable to the local peculiarities of the ports within their limits"). It is fundamental in our federal structure that States have vast residual powers. Those powers, unless constrained or displaced by the existence of federal authority or by proper federal enactments, are often exercised in concurrence with those of the National Government. *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819).

As *Ray* itself made apparent, the States may enforce rules governed by Title I of the PWSA unless they run counter to an exercise of federal authority. The analysis under Title I of the PWSA, then, is one of conflict pre-emption, which occurs "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" *California* v. *ARC America Corp.,* 490 U. S. 93, 100–101 (1989) (citations omitted). In this context, Coast Guard regulations are to be given pre-emptive effect over conflicting state laws. *City of New York* v. *FCC*, 486 U. S. 57, 63–64 (1988) ("'[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law"). *Ray* defined the relevant inquiry for Title I pre-emption as whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all. 435 U. S., at 171–172; see also *id.*, at 178 ("'[W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 774 (1947)"). *Ray* also recognized that, even in the context of a regulation related to local waters, a federal official with an overview of all possible ramifications of a particular requirement might be in the best position to balance all the competing interests. *Id.*, at 177.

While *Ray* explained that Congress, in Title I of the PWSA, preserved state authority to regulate the peculiarities of local waters if there was no conflict with federal regulatory determinations, the Court further held that Congress, in Title II of the PWSA, mandated federal rules on the subjects or matters there specified, demanding uniformity. *Id.*, at 168 ("Title II leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord. A state law in this area . . . would frustrate the congressional desire of achieving uniform, international standards"). Title II requires the Coast Guard to impose national regulations governing the general seaworthiness of tankers and their crews. *Id.*, at 160. Under *Ray*'s interpretation of the Title II PWSA provision now found at 46 U. S. C. § 3703(a), only the Federal Government may regulate the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tanker vessels.

In *Ray*, this principle was applied to hold that Washington's tanker design and construction rules were pre-empted. Those requirements failed because they were within a field reserved for federal regulation under 46 U. S. C. § 391a (1982 ed.), the predecessor to § 3703(a). We reaffirm *Ray*'s holding on this point. Contrary to the suggestion of the Court of Appeals, the field of pre-emption established by § 3703(a) cannot be limited to tanker "design" and "construction," terms which cannot be read in isolation from the other subjects found in that section. Title II of the PWSA covers "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tanker vessels. *Ibid.* Congress has left no room for state regulation of these matters. See *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982) (explaining field pre-emption). As the *Ray* Court stated: "[T]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment. Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." 435 U. S., at 165.

The existence of some overlapping coverage between the two titles of the PWSA may make it difficult to determine whether a pre-emption question is controlled by conflict pre-emption principles, applicable generally to Title I, or by field pre-emption rules, applicable generally to Title II. The *Ray* Court acknowledged the difficulty, but declined to resolve every question by the greater pre-emptive force of Title II. We follow the same approach, and conflict pre-emption under

Title I will be applicable in some, although not all, cases. We recognize that the terms used in § 3703(a) are quite broad. In defining their scope, and the scope of the resulting field pre-emption, it will be useful to consider the type of regulations the Secretary has actually promulgated under the section, as well as the section's list of specific types of regulation that must be included. Useful inquiries include whether the rule is justified by conditions unique to a particular port or waterway. See *id.*, at 175 (a Title I regulation is one "based on water depth in Puget Sound or on other local peculiarities"). Furthermore, a regulation within the State's residual powers will often be of limited extraterritorial effect, not requiring the tanker to modify its primary conduct outside the specific body of water purported to justify the local rule. Limited extraterritorial effect explains why *Ray* upheld a state rule requiring a tug escort for certain vessels, *id.*, at 171, and why state rules requiring a registered vessel (*i. e.*, one involved in foreign trade) to take on a local pilot have historically been allowed, *id.*, at 159–160. Local rules not pre-empted under Title II of the PWSA pose a minimal risk of innocent noncompliance, do not affect vessel operations outside the jurisdiction, do not require adjustment of systemic aspects of the vessel, and do not impose a substantial burden on the vessel's operation within the local jurisdiction itself.

## IV

The field pre-emption rule surrounding Title II and § 3703(a) and the superseding effect of additional federal statutes are illustrated by the pre-emption of four of Washington's tanker regulations. We address these because the attempted reach of the state rules is well demonstrated by the briefs and record before us; other parts of the state regulatory scheme can be addressed on remand.

First, Washington imposes a series of training requirements on a tanker's crew. WAC § 317–21–230; see also Appendix, *infra*, at 118. A covered vessel is required to certify that its crew has "complete[d] a comprehensive training program approved by the [State]." The State requires the vessel's master to "be trained in shipboard management" and licensed deck officers to be trained in bridge resource management, automated radar plotting aids, shiphandling, crude oil washing, inert gas systems, cargo handling, oil spill prevention and response, and shipboard fire fighting. The state law mandates a series of "weekly," "monthly," and "quarterly" drills.

This state requirement under WAC § 317–21–230 does not address matters unique to the waters of Puget Sound. On the contrary, it imposes requirements that control the staffing, operation, and manning of a tanker outside of Washington's waters. The training and drill requirements pertain to "operation" and "personnel qualifications" and so are pre-empted by 46 U. S. C. § 3703(a). Our conclusion that training is a field reserved to the Federal Government receives further confirmation from the circumstance that the STCW Convention addresses "training" and "qualification" requirements of the crew, Art. VI, and that the United States has enacted crew training requirements. *E. g.,* 46 CFR pts. 10, 12, 13, 15 (1999).

The second Washington rule we find pre-empted is WAC § 317–21–250; see also Appendix, *infra,* at 119. Washington imposes English language proficiency requirements on a tanker's crew. This requirement will dictate how a tanker operator staffs the vessel even from the outset of the voyage, when the vessel may be thousands of miles from Puget Sound. It is not limited to governing local traffic or local peculiarities. The State's attempted rule is a "personnel qualification" pre-empted by § 3703(a) of Title II. In addition, there is another federal statute, 33 U. S. C. § 1228(a)(7), on the subject. It provides: "[N]o vessel . . . shall operate in the navigable waters of the United States . . . , if such vessel . . . while underway, does not have at least one licensed deck officer on the navigation bridge who is capable of clearly understanding English." The statute may not be supplemented by laws enacted by the States without compromising the uniformity the federal rule itself achieves.

The third Washington rule we find invalid under field pre-emption is a navigation watch requirement in WAC § 317–21–200; see also Appendix, *infra*, at 118. Washington has different rules for navigation watch, depending on whether the tanker is operating in restricted visibility or not. We mention the restricted visibility rule below, but now evaluate the requirement which applies in general terms and reads: "[T]he navigation watch shall consist of at least two licensed deck officers, a helmsman, and a lookout." The general watch requirement is not tied to the peculiarities of Puget Sound; it applies throughout Washington's waters and at all times. It is a general operating requirement and is pre-empted as an attempt to regulate a tanker's "operation" and "manning" under 46 U. S. C. § 3703(a).

We have illustrated field pre-emption under § 3703(a) by discussing three of Washington's rules which, under the current state of the record, we can determine cannot be enforced due to the assertion of federal authority found in that section. The parties discuss other federal statutory provisions and international agreements which also govern specific aspects of international maritime commerce. In appropriate circumstances, these also may have pre-emptive effect.

For example, the record before us reveals that a fourth state rule cannot stand in light of other sources of federal regulation of the same subject. Washington requires vessels that ultimately reach its waters to report certain marine casualties. WAC § 317–21–130; see also Appendix, *infra*, at 117–118. The requirement applies to incidents (defined as a "collision," "allision," "near-miss incident," "marine casualty" of listed kinds, "accidental or intentional grounding," "failure of the propulsion or primary steering systems," "failure of a component or control system," "fire, flood, or other incident that affects the vessel's seaworthiness," and "spills of oil"), regardless of where in the world they might have occurred. A vessel operator is required by the state regulation to make a detailed report to the State on each incident, listing the date, location, and weather conditions. The report must also list the government agencies to whom the event was reported and must contain a "brief analysis of any known causes" and a "description of measures taken to prevent a reoccurrence." WAC § 317–21–130.

The State contends that its requirement is not pre-empted because it is similar to federal requirements. This is an incorrect statement of the law. It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements. The Court observed this principle when Commerce Clause doctrine was beginning to take shape, holding in *Sinnot* v. *Davenport*, 22 How. 227 (1859), that Alabama could not require vessel owners to provide certain information as a condition of operating in state waters even though federal law also required the owner of the vessel "to furnish, under oath, . . . all the information required by this State law." *Id.*, at 242. The appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation. On this point, Justice Holmes' later observation is relevant: "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604 (1915).

We hold that Congress intended that the Coast Guard regulations be the sole source of a vessel's reporting obligations with respect to the matters covered by the challenged state statute. Under 46 U. S. C. § 6101, the Coast Guard "shall prescribe regulations on the marine casualties to be reported and the manner of reporting," and the statute lists the kinds of casualties that the regulations must cover. See also § 3717(a)(4) (requiring the Secretary of Transportation to "establish a marine safety information system"). Congress did not intend its reporting obligations to be cumulative to those enacted by each political subdivision whose jurisdiction a vessel enters. The State's reporting requirement is a significant burden in terms of cost and the risk of innocent noncompliance. *The Roanoke,* 189 U. S. 185, 195 (1903) (the master of a vessel is in a position "such that it is almost impossible for him to acquaint himself with the laws of each individual State he may visit"). Furthermore, it affects a vessel operator's out-of-state obligations and conduct, where a State's jurisdiction and authority are most in doubt. The state reporting requirement under WAC § 317–21–130 is pre-empted.

## V

As to conflict pre-emption under Title I, Washington argues that certain of its regulations, such as its watch requirement in times of restricted visibility, are of limited extraterritorial effect and necessary to address the peculiarities of Puget Sound. On remand, the Court of Appeals or District Court should consider whether the remaining regulations are pre-empted under Title I conflict pre-emption or Title II field pre-emption, or are otherwise pre-empted by these titles or under any other federal law or international agreement raised as possible sources of pre-emption.

We have determined that Washington's regulations regarding general navigation watch procedures, English language skills, training, and casualty reporting are pre-empted. Petitioners make substantial arguments that the remaining regulations are pre-empted as well. It is preferable that the remaining claims be considered by the Court of Appeals or by the District Court within the framework we have discussed. The United States did not participate in these cases until appeal. Resolution of these cases would benefit from the development of a full record by all interested parties.

We infer from the record that Washington is not now enforcing its regulations. If, pending adjudication of these cases on remand, a threat of enforcement emerges, the Court of Appeals or the District Court would weigh any application for stay under the appropriate legal standards in light of the principles we have discussed and with recognition of the national interests at stake.

When one contemplates the weight and immense mass of oil ever in transit by tankers, the oil's proximity to coastal life, and its destructive power even if a spill occurs far upon the open sea, international, federal, and state regulation may be insufficient protection. Sufficiency, however, is not the question before us. The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate. States, as well as environmental groups and local port authorities, will participate in the process. See 46 U. S. C. §3703(a) (requiring the Coast Guard to consider the views of "officials of State and local governments," "representative of port and harbor authorities," and "representatives of environmental groups" in arriving at national standards).

The judgment of the Court of Appeals is reversed, and these cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## APPENDIX TO OPINION OF THE COURT

"1. Event Reporting—WAC 317–21–130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.

"2. Operating Procedures—Watch Practices—[WAC 317-21-200]. Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the 'standard practice throughout the owner's or operator's fleet,' and which organizes responsibilities and coordinates communication between members of the bridge.

"3. Operating Procedures—Navigation—WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.

"4. Operating Procedures—Engineering—WAC 317-21-210. Requires tankers in state waters to follow specified engineering and monitoring practices.

"5. Operating Procedures—Prearrival Tests and Inspections—WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.

"6. Operating Procedures—Emergency Procedures—WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.

"7. Operating Procedures—Events—WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.

"8. Personnel Policies—Training—WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

"9. Personnel Policies—Illicit Drugs and Alcohol Use—WAC 317–21–235. Requires drug and alcohol testing and reporting.

"10. Personnel Policies—Personnel Evaluation—WAC 317–21–240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.

"11. Personnel Policies—Work Hours—WAC 317–21–245. Sets limitations on the number of hours crew members may work.

"12. Personnel Policies—Language—WAC 317–21–250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.

"13. Personnel Policies—Record Keeping—WAC 317–21–255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.

"14. Management—WAC 317–21–260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development, and fitness, and technological improvements in navigation.

"15. Technology—WAC 317–21–265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

"16. Advance Notice of Entry and Safety Reports—WAC 317–21–540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment." 148 F. 3d, at 1057–1058 (footnote omitted).

# FOOD AND DRUG ADMINISTRATION ET AL. *v.* BROWN & WILLIAMSON TOBACCO CORP. ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98–1152. Argued December 1, 1999—Decided March 21, 2000

The Food, Drug, and Cosmetic Act (FDCA or Act), 21 U. S. C. § 301 *et seq.*, grants the Food and Drug Administration (FDA), as the designee of the Secretary of Health and Human Services (HHS), the authority to regulate, among other items, "drugs" and "devices," §§ 321(g)–(h), 393. In 1996, the FDA asserted jurisdiction to regulate tobacco products, concluding that, under the FDCA, nicotine is a "drug" and cigarettes and smokeless tobacco are "devices" that deliver nicotine to the body. Pursuant to this authority, the FDA promulgated regulations governing tobacco products' promotion, labeling, and accessibility to children and adolescents. The FDA found that tobacco use is the Nation's leading cause of premature death, resulting in more than 400,000 deaths annually, and that most adult smokers begin when they are minors. The regulations therefore aim to reduce tobacco use by minors so as to substantially reduce the prevalence of addiction in future generations, and thus the incidence of tobacco-related death and disease. Respondents, a group of tobacco manufacturers, retailers, and advertisers, filed this suit challenging the FDA's regulations. They moved for summary judgment on the ground, *inter alia,* that the FDA lacked jurisdiction to regulate tobacco products as customarily marketed, that is, without manufacturer claims of therapeutic benefit. The District Court upheld the FDA's authority, but the Fourth Circuit reversed, holding that Congress has not granted the FDA jurisdiction to regulate tobacco products. The court concluded that construing the FDCA to include tobacco products would lead to several internal inconsistencies in the Act. It also found that evidence external to the FDCA—that the FDA consistently stated before 1995 that it lacked jurisdiction over tobacco, that Congress has enacted several tobacco-specific statutes fully cognizant of the FDA's position, and that Congress has considered and rejected many bills that would have given the agency such authority—confirms this conclusion.

*Held:* Reading the FDCA as a whole, as well as in conjunction with Congress' subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority to regulate tobacco products as customarily marketed. Pp. 131–161.

(a) Because this case involves an agency's construction of a statute it administers, the Court's analysis is governed by *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, under which a reviewing court must first ask whether Congress has directly spoken to the precise question at issue, *id.*, at 842. If so, the court must give effect to Congress' unambiguously expressed intent. *E. g., id.*, at 843. If not, the court must defer to the agency's construction of the statute so long as it is permissible. See, *e. g., INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 424. In determining whether Congress has specifically addressed the question at issue, the court should not confine itself to examining a particular statutory provision in isolation. Rather, it must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme. *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 569. In addition, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. See, *e. g., United States* v. *Estate of Romani*, 523 U. S. 517, 530–531. Finally, the court must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. Cf. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231. Pp. 131–133.

(b) Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction. A fundamental precept of the FDCA is that any product regulated by the FDA that remains on the market must be safe and effective for its intended use. See, *e. g.*, § 393(b)(2). That is, the potential for inflicting death or physical injury must be offset by the possibility of therapeutic benefit. *United States* v. *Rutherford*, 442 U. S. 544, 556. In its rulemaking proceeding, the FDA quite exhaustively documented that tobacco products are unsafe, dangerous, and cause great pain and suffering from illness. These findings logically imply that, if tobacco products were "devices" under the FDCA, the FDA would be required to remove them from the market under the FDCA's misbranding, see, *e. g.*, § 331(a), and device classification, see, *e. g.*, § 360e(d)(2)(A), provisions. In fact, based on such provisions, the FDA itself has previously asserted that if tobacco products were within its jurisdiction, they would have to be removed from the market because it would be impossible to prove they were safe for their intended use. Congress, however, has foreclosed a ban of such products, choosing instead to create a distinct regulatory scheme focusing on the labeling and advertising of cigarettes and smokeless tobacco. Its express policy is to protect commerce and the national economy while informing consumers about any adverse health effects.

See 15 U. S. C. § 1331. Thus, an FDA ban would plainly contradict congressional intent. Apparently recognizing this dilemma, the FDA has concluded that tobacco products are actually "safe" under the FDCA because banning them would cause a greater harm to public health than leaving them on the market. But this safety determination—focusing on the relative harms caused by alternative remedial measures—is not a substitute for those required by the FDCA. Various provisions in the Act require the agency to determine that, at least for some consumers, the product's therapeutic benefits outweigh the risks of illness or serious injury. This the FDA cannot do, because tobacco products are unsafe for obtaining any therapeutic benefit. The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit. Pp. 133–143.

(c) The history of tobacco-specific legislation also demonstrates that Congress has spoken directly to the FDA's authority to regulate tobacco products. Since 1965, Congress has enacted six separate statutes addressing the problem of tobacco use and human health. Those statutes, among other things, require that health warnings appear on all packaging and in all print and outdoor advertisements, see 15 U. S. C. §§ 1331, 1333, 4402; prohibit the advertisement of tobacco products through any electronic communication medium regulated by the Federal Communications Commission, see §§ 1335, 4402(f); require the Secretary of HHS to report every three years to Congress on research findings concerning tobacco's addictive property, 42 U. S. C. § 290aa–2(b)(2); and make States' receipt of certain federal block grants contingent on their prohibiting any tobacco product manufacturer, retailer, or distributor from selling or distributing any such product to individuals under age 18, § 300x–26(a)(1). This tobacco-specific legislation has created a specific regulatory scheme for addressing the problem of tobacco and health. And it was adopted against the backdrop of the FDA consistently and resolutely stating that it was without authority under the FDCA to regulate tobacco products as customarily marketed. In fact, Congress several times considered and rejected bills that would have given the FDA such authority. Indeed, Congress' actions in this area have evidenced a clear intent to preclude a meaningful policymaking role for any administrative agency. Further, Congress' tobacco legislation prohibits any additional regulation of tobacco product labeling with respect to tobacco's health consequences, a central aspect of regulation under the FDCA. Under these circumstances, it is evident that Congress has ratified the FDA's previous, long-held position that it lacks jurisdiction to regulate tobacco products as customarily marketed. Congress has created a distinct scheme for addressing the subject, and that scheme excludes any role for FDA regulation. Pp. 143–159.

(d) Finally, the Court's inquiry is shaped, at least in some measure, by the nature of the question presented. *Chevron* deference is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. See 467 U. S., at 844. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is hardly an ordinary case. Contrary to the agency's position from its inception until 1995, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. It is highly unlikely that Congress would leave the determination as to whether the sale of tobacco products would be regulated, or even banned, to the FDA's discretion in so cryptic a fashion. See *MCI Telecommunications, supra,* at 231. Given tobacco's unique political history, as well as the breadth of the authority that the FDA has asserted, the Court is obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power. Pp. 159–161.

(e) No matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. Courts must take care not to extend a statute's scope beyond the point where Congress indicated it would stop. *E. g., United States* v. *Article of Drug . . . Bacto-Unidisk,* 394 U. S. 784, 800. P. 161.

153 F. 3d 155, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 161.

*Solicitor General Waxman* argued the cause for petitioners. With him on the briefs were *Acting Assistant Attorney General Ogden, Deputy Solicitor General Kneedler, Deputy Assistant Attorney General Schultz, Irving L. Gornstein, Eugene Thirolf, Douglas Letter, Gerald C. Kell, Chris-*

*tine N. Kohl, Margaret Jane Porter, Karen E. Schifter,* and *Patricia J. Kaeding.*

*Richard M. Cooper* argued the cause for respondents. With him on the brief for respondent R. J. Reynolds Tobacco Co. was *Steven M. Umin. Andrew S. Krulwich, Bert W. Rein, Thomas W. Kirby,* and *Michael L. Robinson* filed a brief for respondent Brown & Williamson Tobacco Corp. *Larry B. Sitton* filed a brief for respondents United States Tobacco Co. et al. *William C. MacLeod* filed a brief for respondents National Association of Convenience Stores et al. *Peter T. Grossi, Jr., Arthur N. Levine, Jeff Richman, Richard A. Merrill,* and *Herbert Dym* filed a brief for respondents Philip Morris Inc. et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Mike Hatch,* Attorney General of Minnesota, *James S. Alexander,* Assistant Attorney General, *Louise H. Renne,* and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *John J. Farmer, Jr.,* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Mark Barnett* of South Dakota, *John Cornyn* of Texas, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.,* of West Virginia, *James E. Doyle* of Wisconsin, and *Gay Woodhouse* of Wyoming; for Action on Smoking and Health by *John F. Banzhaf III* and *Kathleen E. Scheg;* for the American Cancer Society, Inc., by *Russell E. Brooks, David R. Gelfand, Charles W. Westland,* and *William J. Dalton;* for the American

JUSTICE O'CONNOR delivered the opinion of the Court.

This case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use. In 1996, the Food and Drug Administration (FDA), after having expressly disavowed any such authority since its inception, asserted jurisdiction to regulate tobacco products. See 61 Fed. Reg. 44619–45318. The FDA concluded that nicotine is a "drug" within the meaning of the Food, Drug, and Cosmetic Act (FDCA or Act), 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.*, and that cigarettes and smokeless tobacco are "combination products" that deliver nicotine to the body. 61 Fed. Reg. 44397 (1996). Pursuant to this authority, it promulgated regulations intended to reduce tobacco consumption among children and adolescents. *Id.*, at 44615–44618. The agency believed that, because most tobacco consumers begin their use before reaching the age of 18, curbing tobacco use by minors could substantially reduce the prevalence of addiction in future generations and thus the incidence of tobacco-related death and disease. *Id.*, at 44398–44399.

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project* v. *Missouri*, 484 U. S. 495, 517 (1988). And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unam-

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College of Chest Physicians by *Raymond D. Cotton;* and for Public Citizen, Inc., et al. by *Allison M. Zieve, Alan B. Morrison,* and *David C. Vladeck.*

Briefs of *amici curiae* urging affirmance were filed for the Pacific Legal Foundation by *Anne M. Hayes* and *M. Reed Hopper;* for the Product Liability Advisory Council, Inc., by *Kenneth S. Geller;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

biguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.

## I

The FDCA grants the FDA, as the designee of the Secretary of Health and Human Services (HHS), the authority to regulate, among other items, "drugs" and "devices." See 21 U. S. C. §§ 321(g)–(h), 393 (1994 ed. and Supp. III). The Act defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body." 21 U. S. C. § 321(g)(1)(C). It defines "device," in part, as "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, including any component, part, or accessory, which is . . . intended to affect the structure or any function of the body." § 321(h). The Act also grants the FDA the authority to regulate so-called "combination products," which "constitute a combination of a drug, device, or biological product." § 353(g)(1). The FDA has construed this provision as giving it the discretion to regulate combination products as drugs, as devices, or as both. See 61 Fed. Reg. 44400 (1996).

On August 11, 1995, the FDA published a proposed rule concerning the sale of cigarettes and smokeless tobacco to children and adolescents. 60 Fed. Reg. 41314–41787. The rule, which included several restrictions on the sale, distribution, and advertisement of tobacco products, was designed to reduce the availability and attractiveness of tobacco products to young people. *Id.*, at 41314. A public comment period followed, during which the FDA received over 700,000 submissions, more than "at any other time in its history on any other subject." 61 Fed. Reg. 44418 (1996).

On August 28, 1996, the FDA issued a final rule entitled "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents." *Id.*, at 44396. The FDA determined that nicotine is a "drug" and that cigarettes and smokeless tobacco are "drug delivery devices," and therefore it had jurisdiction under the FDCA to regulate tobacco products as customarily marketed—that is, without manufacturer claims of therapeutic benefit. *Id.*, at 44397, 44402. First, the FDA found that tobacco products " 'affect the structure or any function of the body' " because nicotine "has significant pharmacological effects." *Id.*, at 44631. Specifically, nicotine "exerts psychoactive, or mood-altering, effects on the brain" that cause and sustain addiction, have both tranquilizing and stimulating effects, and control weight. *Id.*, at 44631–44632. Second, the FDA determined that these effects were "intended" under the FDCA because they "are so widely known and foreseeable that [they] may be deemed to have been intended by the manufacturers," *id.*, at 44687; consumers use tobacco products "predominantly or nearly exclusively" to obtain these effects, *id.*, at 44807; and the statements, research, and actions of manufacturers revealed that they "have 'designed' cigarettes to provide pharmacologically active doses of nicotine to consumers," *id.*, at 44849. Finally, the agency concluded that cigarettes and smokeless tobacco are "combination products" because, in addition to containing nicotine, they include device components that deliver a controlled amount of nicotine to the body, *id.*, at 45208–45216.

Having resolved the jurisdictional question, the FDA next explained the policy justifications for its regulations, detailing the deleterious health effects associated with tobacco use. It found that tobacco consumption was "the single leading cause of preventable death in the United States." *Id.*, at 44398. According to the FDA, "[m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease." *Ibid.* The agency also determined that the only way to reduce the amount of tobacco-related illness and mortality was to reduce the level of addiction, a goal that could be accomplished only by preventing children and adolescents from starting to use tobacco. *Id.*, at 44398–44399. The FDA found that 82% of adult smokers had their first cigarette before the age of 18, and more than half had already become regular smokers by that age. *Id.*, at 44398. It also found that children were beginning to smoke at a younger age, that the prevalence of youth smoking had recently increased, and that similar problems existed with respect to smokeless tobacco. *Id.*, at 44398–44399. The FDA accordingly concluded that if "the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely ever to begin." *Id.*, at 44399.

Based on these findings, the FDA promulgated regulations concerning tobacco products' promotion, labeling, and accessibility to children and adolescents. See *id.*, at 44615–44618. The access regulations prohibit the sale of cigarettes or smokeless tobacco to persons younger than 18; require retailers to verify through photo identification the age of all purchasers younger than 27; prohibit the sale of cigarettes in quantities smaller than 20; prohibit the distribution of free samples; and prohibit sales through self-service displays and vending machines except in adult-only locations. *Id.*, at 44616–44617. The promotion regulations require that any print advertising appear in a black-and-white, text-only format unless the publication in which it appears is read almost exclusively by adults; prohibit outdoor advertising within 1,000 feet of any public playground or school; prohibit the distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer's brand name; and prohibit a manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural event using its brand name. *Id.*, at 44617–44618. The labeling regulation requires that the statement, "A Nicotine-Delivery Device for Persons 18 or Older," appear on all tobacco product packages. *Id.*, at 44617.

The FDA promulgated these regulations pursuant to its authority to regulate "restricted devices." See 21 U. S. C. § 360j(e). The FDA construed § 353(g)(1) as giving it the discretion to regulate "combination products" using the Act's drug authorities, device authorities, or both, depending on "how the public health goals of the act can be best accomplished." 61 Fed. Reg. 44403 (1996). Given the greater flexibility in the FDCA for the regulation of devices, the FDA determined that "the device authorities provide the most appropriate basis for regulating cigarettes and smokeless tobacco." *Id.*, at 44404. Under 21 U. S. C. § 360j(e), the agency may "require that a device be restricted to sale, distribution, or use . . . upon such other conditions as [the FDA] may prescribe in such regulation, if, because of its potentiality for harmful effect or the collateral measures necessary to its use, [the FDA] determines that there cannot otherwise be reasonable assurance of its safety and effectiveness." The FDA reasoned that its regulations fell within the authority granted by § 360j(e) because they related to the sale or distribution of tobacco products and were necessary for providing a reasonable assurance of safety. 61 Fed. Reg. 44405–44407 (1996).

Respondents, a group of tobacco manufacturers, retailers, and advertisers, filed suit in United States District Court for the Middle District of North Carolina challenging the regulations. See *Coyne Beahm, Inc.* v. *FDA*, 966 F. Supp. 1374 (1997). They moved for summary judgment on the grounds that the FDA lacked jurisdiction to regulate tobacco products as customarily marketed, the regulations exceeded the FDA's authority under 21 U. S. C. § 360j(e), and the advertising restrictions violated the First Amendment. Second Brief in Support of Plaintiffs' Motion for Summary Judgment in No. 2:95CV00591 (MDNC), in 3 Rec. in No. 97–1604 (CA4), Tab No. 40; Third Brief in Support of Plaintiffs' Motion for Summary Judgment in No. 2:95CV00591 (MDNC), in 3 Rec. in No. 97–1604 (CA4), Tab No. 42. The District Court granted respondents' motion in part and denied it in part. 966 F. Supp., at 1400. The court held that the FDCA authorizes the FDA to regulate tobacco products as customarily marketed and that the FDA's access and labeling regulations are permissible, but it also found that the agency's advertising and promotion restrictions exceed its authority under § 360j(e). *Id.*, at 1380–1400. The court stayed implementation of the regulations it found valid (except the prohibition on the sale of tobacco products to minors) and certified its order for immediate interlocutory appeal. *Id.*, at 1400–1401.

The Court of Appeals for the Fourth Circuit reversed, holding that Congress has not granted the FDA jurisdiction to regulate tobacco products. See 153 F. 3d 155 (1998). Examining the FDCA as a whole, the court concluded that the FDA's regulation of tobacco products would create a number of internal inconsistencies. *Id.*, at 162–167. Various provisions of the Act require the agency to determine that any regulated product is "safe" before it can be sold or allowed to remain on the market, yet the FDA found in its rulemaking proceeding that tobacco products are "dangerous" and "unsafe." *Id.*, at 164–167. Thus, the FDA would apparently have to ban tobacco products, a result the court found clearly contrary to congressional intent. *Ibid.* This apparent anomaly, the Court of Appeals concluded, demonstrates that Congress did not intend to give the FDA authority to regulate tobacco. *Id.*, at 167. The court also found that evidence external to the FDCA confirms this conclusion. Importantly, the FDA consistently stated before 1995 that it lacked jurisdiction over tobacco, and Congress has enacted several tobacco-specific statutes fully cognizant of the FDA's position. See *id.*, at 168–176. In fact, the court reasoned, Congress has considered and rejected many bills that would have given the agency such authority. See *id.*, at 170–171. This, along with the absence of any intent by the enacting Congress in 1938 to subject tobacco products to regulation under the FDCA, demonstrates that Congress intended to withhold such authority from the FDA. *Id.*, at 167–176. Having resolved the jurisdictional question against the agency, the Court of Appeals did not address whether the regulations exceed the FDA's authority under 21 U. S. C. § 360j(e) or violate the First Amendment. See 153 F. 3d, at 176, n. 29.

We granted the federal parties' petition for certiorari, 526 U. S. 1086 (1999), to determine whether the FDA has authority under the FDCA to regulate tobacco products as customarily marketed.

## II

The FDA's assertion of jurisdiction to regulate tobacco products is founded on its conclusions that nicotine is a "drug" and that cigarettes and smokeless tobacco are "drug delivery devices." Again, the FDA found that tobacco products are "intended" to deliver the pharmacological effects of satisfying addiction, stimulation and tranquilization, and weight control because those effects are foreseeable to any reasonable manufacturer, consumers use tobacco products to obtain those effects, and tobacco manufacturers have designed their products to produce those effects. 61 Fed. Reg. 44632–44633 (1996). As an initial matter, respondents take issue with the FDA's reading of "intended," arguing that it is a term of art that refers exclusively to claims made by the manufacturer or vendor about the product. See Brief for Respondent Brown & Williamson Tobacco Corp. 6. That is, a product is not a drug or device under the FDCA unless the manufacturer or vendor makes some express claim concerning the product's therapeutic benefits. See *id.*, at 6–7. We need not resolve this question, however, because assuming, *arguendo,* that a product can be "intended to affect the structure or any function of the body" absent claims of therapeutic or medical benefit, the FDA's claim to jurisdiction contravenes the clear intent of Congress.

A threshold issue is the appropriate framework for analyzing the FDA's assertion of authority to regulate tobacco products. Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). Under *Chevron,* a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." *Id.,* at 842. If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." *Id.,* at 843; see also *United States* v. *Haggar Apparel Co.,* 526 U. S. 380, 392 (1999); *Holly Farms Corp.* v. *NLRB,* 517 U. S. 392, 398 (1996). But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. See *INS* v. *Aguirre-Aguirre,* 526 U. S. 415, 424 (1999); *Auer* v. *Robbins,* 519 U. S. 452, 457 (1997). Such deference is justified because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones," *Chevron, supra,* at 866, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated, see *Rust* v. *Sullivan,* 500 U. S. 173, 187 (1991).

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. See *Brown* v. *Gardner,* 513 U. S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context"). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury,* 489 U. S. 803, 809 (1989). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.,* 513 U. S. 561, 569 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC* v. *Mandel Brothers, Inc.,* 359 U. S. 385, 389 (1959). Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. See *United States* v. *Estate of Romani,* 523 U. S. 517, 530–531 (1998); *United States* v. *Fausto,* 484 U. S. 439, 453 (1988). In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency. Cf. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.,* 512 U. S. 218, 231 (1994).

With these principles in mind, we find that Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products.

## A

Viewing the FDCA as a whole, it is evident that one of the Act's core objectives is to ensure that any product regulated by the FDA is "safe" and "effective" for its intended use. See 21 U. S. C. § 393(b)(2) (1994 ed., Supp. III) (defining the FDA's mission); More Information for Better Patient Care: Hearing before the Senate Committee on Labor and Human Resources, 104th Cong., 2d Sess., 83 (1996) (statement of FDA Deputy Comm'r Schultz) ("A fundamental precept of drug and device regulation in this country is that these products must be proven safe and effective before they can be sold"). This essential purpose pervades the FDCA. For instance, 21 U. S. C. § 393(b)(2) (1994 ed., Supp. III) defines the FDA's "[m]ission" to include "protect[ing] the public health by ensuring that . . . drugs are safe and effective" and that "there is reasonable assurance of the safety and effectiveness of devices intended for human use." The FDCA requires premarket approval of any new drug, with some limited exceptions, and states that the FDA "shall issue an order refusing to approve the application" of a new drug if it is not safe and effective for its intended purpose. §§ 355(d)(1)–(2), (4)–(5). If the FDA discovers after approval that a drug is unsafe or ineffective, it "shall, after due notice and opportunity for hearing to the applicant, withdraw approval" of the drug. 21 U. S. C. §§ 355(e)(1)–(3). The Act also requires the FDA to classify all devices into one of three categories. § 360c(b)(1). Regardless of which category the FDA chooses, there must be a "reasonable assurance of the safety and effectiveness of the device." 21 U. S. C. §§ 360c(a)(1)(A)(i), (B), (C) (1994 ed. and Supp. III); 61 Fed. Reg. 44412 (1996). Even the "restricted device" provision pursuant to which the FDA promulgated the regulations at issue here authorizes the agency to place conditions on the sale or distribution of a device specifically when "there cannot otherwise be reasonable assurance of its safety and effectiveness." 21 U. S. C. § 360j(e). Thus, the Act generally requires the FDA to prevent the marketing of any drug or device where the "potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit." *United States* v. *Rutherford*, 442 U. S. 544, 556 (1979).

In its rulemaking proceeding, the FDA quite exhaustively documented that "tobacco products are unsafe," "dangerous," and "cause great pain and suffering from illness." 61 Fed. Reg. 44412 (1996). It found that the consumption of tobacco products presents "extraordinary health risks," and that "tobacco use is the single leading cause of preventable death in the United States." *Id.*, at 44398. It stated that "[m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease, often suffering long and painful deaths," and that "[t]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." *Ibid.* Indeed, the FDA characterized smoking as "a pediatric disease," *id.*, at 44421, because "one out of every three young people who become regular smokers . . . will die prematurely as a result," *id.*, at 44399.

These findings logically imply that, if tobacco products were "devices" under the FDCA, the FDA would be required to remove them from the market. Consider, first, the FDCA's provisions concerning the misbranding of drugs or devices. The Act prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." 21 U. S. C. § 331(a). In light of the FDA's findings, two distinct FDCA provisions would render cigarettes and smokeless tobacco misbranded devices. First, § 352(j) deems a drug or device misbranded "[i]f it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." The FDA's findings make clear that tobacco products are "dangerous to health" when used in the manner prescribed. Second, a drug or device is misbranded under the Act "[u]nless its labeling bears . . . adequate directions for use . . . in such manner and form, as are necessary for the protection of users," except where such directions are "not necessary for the protection of the public health." § 352(f)(1). Given the FDA's conclusions concerning the health consequences of tobacco use, there are no directions that could adequately protect consumers. That is, there are no directions that could make tobacco products safe for obtaining their intended effects. Thus, were tobacco products within the FDA's jurisdiction, the Act would deem them misbranded devices that could not be introduced into interstate commerce. Contrary to the dissent's contention, the Act admits no remedial discretion once it is evident that the device is misbranded.

Second, the FDCA requires the FDA to place all devices that it regulates into one of three classifications. See § 360c(b)(1). The agency relies on a device's classification in determining the degree of control and regulation necessary to ensure that there is "a reasonable assurance of safety and effectiveness." 61 Fed. Reg. 44412 (1996). The FDA has yet to classify tobacco products. Instead, the regulations at issue here represent so-called "general controls," which the Act entitles the agency to impose in advance of classification. See *id.*, at 44404–44405. Although the FDCA prescribes no deadline for device classification, the FDA has stated that it will classify tobacco products "in a future rulemaking" as required by the Act. *Id.*, at 44412. Given the FDA's findings regarding the health consequences of tobacco use, the agency would have to place cigarettes and smokeless tobacco in Class III because, even after the application of the Act's available controls, they would "presen[t] a potential unreasonable risk of illness or injury." 21 U. S. C. § 360c(a)(1)(C). As Class III devices, tobacco products would be subject to the FDCA's premarket approval process. See 21 U. S. C. § 360c(a)(1)(C) (1994 ed., Supp. III); 21 U. S. C. § 360e; 61 Fed. Reg. 44412 (1996). Under these provisions, the FDA would be prohibited from approving an application for premarket approval without "a showing of reasonable assurance that such device is safe under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof." 21 U. S. C. § 360e(d)(2)(A). In view of the FDA's conclusions regarding the health effects of tobacco use, the agency would have no basis for finding any such reasonable assurance of safety. Thus, once the FDA fulfilled its statutory obligation to classify tobacco products, it could not allow them to be marketed.

The FDCA's misbranding and device classification provisions therefore make evident that were the FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them. In fact, based on these provisions, the FDA itself has previously taken the position that if tobacco products were within its jurisdiction, "they would have to be removed from the market because it would be impossible to prove they were safe for their intended us[e]." Public Health Cigarette Amendments of 1971: Hearings before the Commerce Subcommittee on S. 1454, 92d Cong., 2d Sess., 239 (1972) (hereinafter 1972 Hearings) (statement of FDA Comm'r Charles Edwards). See also Cigarette Labeling and Advertising: Hearings before the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., 18 (1964) (hereinafter 1964 Hearings) (statement of Dept. of Health, Education, and Welfare (HEW) Secretary Anthony Celebrezze that proposed amendments to the FDCA that would have given the FDA jurisdiction over "smoking product[s]" "might well completely outlaw at least cigarettes").

Congress, however, has foreclosed the removal of tobacco products from the market. A provision of the United States Code currently in force states that "[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." 7 U. S. C. § 1311(a). More importantly, Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965. See Federal Cigarette Labeling and Advertising Act (FCLAA), Pub. L. 89–92, 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub. L. 91–222, 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub. L. 98–24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. 98–474, 98 Stat. 2200; Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. 99–252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental

Health Administration Reorganization Act, Pub. L. 102–321, § 202, 106 Stat. 394. When Congress enacted these statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. See, *e. g.*, U. S. Dept. of Health, Education, and Welfare, U. S. Surgeon General's Advisory Committee, Smoking and Health 25–40, 69–75 (1964) (hereinafter 1964 Surgeon General's Report) (concluding that cigarette smoking causes lung cancer, coronary artery disease, and chronic bronchitis and emphysema, and that nicotine has various pharmacological effects, including stimulation, tranquilization, and appetite suppression); U. S. Dept. of Health and Human Services, Public Health Service, Health Consequences of Smoking for Women 7–12 (1980) (finding that mortality rates for lung cancer, chronic lung disease, and coronary heart disease are increased for both women and men smokers, and that smoking during pregnancy is associated with significant adverse health effects on the unborn fetus and newborn child); U. S. Dept. of Health and Human Services, Public Health Service, Why People Smoke Cigarettes (1983), in Smoking Prevention Education Act, Hearings on H. R. 1824 before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 98th Cong., 1st Sess., 32–37 (1983) (hereinafter 1983 House Hearings) (stating that smoking is "the most widespread example of drug dependence in our country," and that cigarettes "affect the chemistry of the brain and nervous system"); U. S. Dept. of Health and Human Services, Public Health Service, The Health Consequences of Smoking: Nicotine Addiction 6–9, 145–239 (1988) (hereinafter 1988 Surgeon General's Report) (concluding that tobacco products are addicting in much the same way as heroin and cocaine, and that nicotine is the drug that causes addiction). Nonetheless, Congress stopped well short of ordering a ban. Instead, it has generally regulated the labeling and advertisement of tobacco products, expressly providing that it is the policy of Congress that "commerce and the national economy may be . . . protected to the maximum extent consistent with" consumers "be[ing] adequately informed about any adverse health effects." 15 U. S. C. § 1331. Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy . . . to the maximum extent" reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

The FDA apparently recognized this dilemma and concluded, somewhat ironically, that tobacco products are actually "safe" within the meaning of the FDCA. In promulgating its regulations, the agency conceded that "tobacco products are unsafe, as that term is conventionally understood." 61 Fed. Reg. 44412 (1996). Nonetheless, the FDA reasoned that, in determining whether a device is safe under the Act, it must consider "not only the risks presented by a product but also any of the countervailing effects of use of that product, including the consequences of not permitting the product to be marketed." *Id.*, at 44412–44413. Applying this standard, the FDA found that, because of the high level of addiction among tobacco users, a ban would likely be "dangerous." *Id.*, at 44413. In particular, current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop. *Ibid.* The FDA therefore concluded that, "while taking cigarettes and smokeless tobacco off the market could prevent some people from becoming addicted and reduce death and disease for others, the record does not establish that such a ban is the appropriate public health response under the act." *Id.*, at 44398.

It may well be, as the FDA asserts, that "these factors must be considered when developing a regulatory scheme that achieves the best public health result for these products." *Id.*, at 44413. But the FDA's judgment that leaving tobacco products on the market "is more effective in achieving public health goals than a ban," *ibid.*, is no substitute for the specific safety determinations required by the FDCA's various operative provisions. Several provisions in the Act require the FDA to determine that the *product itself* is safe as used by consumers. That is, the product's probable therapeutic benefits must outweigh its risk of harm. See *United States* v. *Rutherford*, 442 U. S., at 555 ("[T]he Commissioner generally considers a drug safe when the expected therapeutic gain justifies the risk entailed by its use"). In contrast, the FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. Thus, although the FDA has concluded that a ban would be "dangerous," it has *not* concluded that tobacco products are "safe" as that term is used throughout the Act.

Consider 21 U. S. C. § 360c(a)(2), which specifies those factors that the FDA may consider in determining the safety and effectiveness of a device for purposes of classification, performance standards, and premarket approval. For all devices regulated by the FDA, there must at least be a "reasonable assurance of the safety and effectiveness of the device." See 21 U. S. C. §§ 360c(a)(1)(A)(i), (B), (C) (1994 ed. and Supp. III); 61 Fed. Reg. 44412 (1996). Title 21 U. S. C. § 360c(a)(2) provides that

> "the safety and effectiveness of a device are to be determined—
>
> "(A) with respect to the persons for whose use the device is represented or intended,

> "(B) with respect to the conditions of use prescribed, recommended, or suggested in the labeling of the device, and
>
> "(C) weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use."

A straightforward reading of this provision dictates that the FDA must weigh the probable therapeutic benefits of the device to the consumer against the probable risk of injury. Applied to tobacco products, the inquiry is whether their purported benefits—satisfying addiction, stimulation and sedation, and weight control—outweigh the risks to health from their use. To accommodate the FDA's conception of safety, however, one must read "any probable benefit to health" to include the benefit to public health stemming from adult consumers' continued use of tobacco products, even though the *reduction* of tobacco use is the *raison d'être* of the regulations. In other words, the FDA is forced to contend that the very evil it seeks to combat is a "benefit to health." This is implausible.

The FDA's conception of safety is also incompatible with the FDCA's misbranding provision. Again, § 352(j) provides that a product is "misbranded" if "it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." According to the FDA's understanding, a product would be "dangerous to health," and therefore misbranded under § 352(j), when, in comparison to leaving the product on the market, a ban would not produce "adverse health consequences" in aggregate. Quite simply, these are different inquiries. Although banning a particular product might be detrimental to public health in aggregate, the product could still be "dangerous to health" when used as directed. Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Consequently, the analogy made by the FDA and the dissent to highly toxic drugs used in the treatment of various cancers is unpersuasive. See 61 Fed. Reg. 44413 (1996); *post*, at 177 (opinion of BREYER, J.). Although "dangerous" in some sense, these drugs are safe within the meaning of the Act because, for certain patients, the therapeutic benefits outweigh the risk of harm. Accordingly, such drugs cannot properly be described as "dangerous to health" under 21 U. S. C. § 352(j). The same is not true for tobacco products. As the FDA has documented in great detail, cigarettes and smokeless tobacco are an unsafe means to obtaining *any* pharmacological effect.

The dissent contends that our conclusion means that "the FDCA requires the FDA to ban outright 'dangerous' drugs or devices," *post*, at 174, and that this is a "perverse" reading of the statute, *post*, at 174, 180. This misunderstands our holding. The FDA, consistent with the FDCA, may clearly regulate many "dangerous" products without banning them. Indeed, virtually every drug or device poses dangers under certain conditions. What the FDA may not do is conclude that a drug or device cannot be used safely for any therapeutic purpose and yet, at the same time, allow that product to remain on the market. Such regulation is incompatible with the FDCA's core objective of ensuring that every drug or device is safe and effective.

Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction. A fundamental precept of the FDCA is that any product regulated by the FDA—but not banned—must be safe for its intended use. Various provisions of the Act make clear that this refers to the safety of using the product to obtain its intended effects, not the public health ramifications of alternative administrative actions by the FDA. That is, the FDA must determine that there is a reasonable assurance that the product's therapeutic benefits outweigh the risk of harm to the consumer. According to this standard, the FDA has concluded that, although tobacco products might be effective in delivering certain pharmacological effects, they are "unsafe" and "dangerous" when used for these purposes. Consequently, if tobacco products were within the FDA's jurisdiction, the Act would require the FDA to remove them from the market entirely. But a ban would contradict Congress' clear intent as expressed in its more recent, tobacco-specific legislation. The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit.

### B

In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U. S., at 453. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States* v. *Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." 523 U. S., at 530–531.

Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health. See *supra*, at 137–138. Those statutes, among other things, require that health warnings appear on all packaging and in all print and outdoor advertisements, see

15 U. S. C. §§ 1331, 1333, 4402; prohibit the advertisement of tobacco products through "any medium of electronic communication" subject to regulation by the Federal Communications Commission (FCC), see §§ 1335, 4402(f); require the Secretary of HHS to report every three years to Congress on research findings concerning "the addictive property of tobacco," 42 U. S. C. § 290aa–2(b)(2); and make States' receipt of certain federal block grants contingent on their making it unlawful "for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18," § 300x–26(a)(1).

In adopting each statute, Congress has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer. In fact, on several occasions over this period, and after the health consequences of tobacco use and nicotine's pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction. Under these circumstances, it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.

On January 11, 1964, the Surgeon General released the report of the Advisory Committee on Smoking and Health. That report documented the deleterious health effects of smoking in great detail, concluding, in relevant part, "that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate." 1964 Surgeon General's Report 31. It also identified the pharmacological effects of nicotine, including "stimulation," "tranquilization," and "suppression of appetite." *Id.*, at 74–75. Seven days after the report's release, the Federal Trade

Commission (FTC) issued a notice of proposed rulemaking, see 29 Fed. Reg. 530–532 (1964), and in June 1964, the FTC promulgated a final rule requiring cigarette manufacturers "to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container . . . that cigarette smoking is dangerous to health and may cause death from cancer and other diseases," *id.*, at 8325. The rule was to become effective January 1, 1965, but, on a request from Congress, the FTC postponed enforcement for six months. See *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 513–514 (1992).

In response to the Surgeon General's report and the FTC's proposed rule, Congress convened hearings to consider legislation addressing "the tobacco problem." 1964 Hearings 1. During those deliberations, FDA representatives testified before Congress that the agency lacked jurisdiction under the FDCA to regulate tobacco products. Surgeon General Terry was asked during hearings in 1964 whether HEW had the "authority to brand or label the packages of cigarettes or to control the advertising there." *Id.*, at 56. The Surgeon General stated that "we do not have such authority in existing laws governing the . . . Food and Drug Administration." *Ibid.* Similarly, FDA Deputy Commissioner Rankin testified in 1965 that "[t]he Food and Drug Administration has no jurisdiction under the Food, Drug, and Cosmetic Act over tobacco, unless it bears drug claims." Cigarette Labeling and Advertising—1965: Hearings on H. R. 2248 before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., 193 (hereinafter 1965 Hearings). See also Letter to Directors of Bureaus, Divisions and Directors of Districts from FDA Bureau of Enforcement (May 24, 1963), in 1972 Hearings 240 ("[T]obacco marketed for chewing or smoking without accompanying therapeutic claims, does not meet the definitions in the Food, Drug, and Cosmetic Act for food, drug, device or cosmetic"). In fact, HEW Secretary Celebrezze urged Congress *not* to amend the FDCA to cover "smoking products" because, in light of the findings in the Surgeon General's report, such a "provision might well completely outlaw at least cigarettes. This would be contrary to what, we understand, is intended or what, in the light of our experience with the 18th amendment, would be acceptable to the American people." 1964 Hearings 18.

The FDA's disavowal of jurisdiction was consistent with the position that it had taken since the agency's inception. As the FDA concedes, it never asserted authority to regulate tobacco products as customarily marketed until it promulgated the regulations at issue here. See Brief for Petitioners 37; see also Brief for Appellee (FDA) in *Action on Smoking and Health* v. *Harris*, 655 F. 2d 236 (CADC 1980), in 9 Rec. in No. 97–1604 (CA4), Tab No. 4, pp. 14–15 ("In the 73 years since the enactment of the original Food and Drug Act, and in the 41 years since the promulgation of the modern Food, Drug, and Cosmetic Act, the FDA has repeatedly informed Congress that cigarettes are beyond the scope of the statute absent health claims establishing a therapeutic intent on behalf of the manufacturer or vendor").

The FDA's position was also consistent with Congress' specific intent when it enacted the FDCA. Before the Act's adoption in 1938, the FDA's predecessor agency, the Bureau of Chemistry, announced that it lacked authority to regulate tobacco products under the Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768, unless they were marketed with therapeutic claims. See U. S. Dept. of Agriculture, Bureau of Chemistry, 13 Service and Regulatory Announcements 24 (Apr. 1914) (Feb. 1914 Announcements ¶ 13, Opinion of Chief of Bureau C. L. Alsberg). In 1929, Congress considered and rejected a bill "[t]o amend the Food and Drugs Act of June 30, 1906, by extending its provisions to tobacco and tobacco products." S. 1468, 71st Cong., 1st Sess., 1. See also 71 Cong. Rec. 2589 (1929) (remarks of Sen. Smoot). And, as the FDA admits, there is no evidence in the text of the FDCA or its legislative history that Congress in 1938 even considered the applicability of the Act to tobacco products. See Brief for Petitioners 22, n. 4. Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter. Of course, whether the Congress that enacted the FDCA specifically intended the Act to cover tobacco products is not determinative; "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 79 (1998); see also *TVA* v. *Hill*, 437 U. S. 153, 185 (1978) ("It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated"). Nonetheless, this intent is certainly relevant to understanding the basis for the FDA's representations to Congress and the background against which Congress enacted subsequent tobacco-specific legislation.

Moreover, before enacting the FCLAA in 1965, Congress considered and rejected several proposals to give the FDA the authority to regulate tobacco. In April 1963, Representative Udall introduced a bill "[t]o amend the Federal Food, Drug, and Cosmetic Act so as to make that Act applicable to smoking products." H. R. 5973, 88th Cong., 1st Sess., 1. Two months later, Senator Moss introduced an identical bill in the Senate. S. 1682, 88th Cong., 1st Sess. (1963). In discussing his proposal on the Senate floor, Senator Moss explained that "this amendment simply places smoking products under FDA jurisdiction, along with foods, drugs, and cosmetics." 109 Cong. Rec. 10322 (1963). In December 1963, Representative Rhodes introduced another bill that would have amended the FDCA "by striking out 'food, drug, device, or cosmetic, each place where it appears therein and inserting in lieu thereof 'food, drug, device, cosmetic, or smoking product.'" H. R. 9512, 88th Cong., 1st Sess., § 3 (1963). And in January 1965, five months before passage of the FCLAA, Representative Udall again introduced a bill to amend the FDCA "to make that Act applicable to smoking products." H. R. 2248, 89th Cong., 1st Sess., 1. None of these proposals became law.

Congress ultimately decided in 1965 to subject tobacco products to the less extensive regulatory scheme of the FCLAA, which created a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." Pub. L. 89–92, §2, 79 Stat. 282. The FCLAA rejected any regulation of advertising, but it required the warning, "Caution: Cigarette Smoking May Be Hazardous to Your Health," to appear on all cigarette packages. *Id.*, §4, 79 Stat. 283. In the FCLAA's "Declaration of Policy," Congress stated that its objective was to balance the goals of ensuring that "the public may be adequately informed that cigarette smoking may be hazardous to health" and protecting "commerce and the national economy . . . to the maximum extent." *Id.*, §2, 79 Stat. 282 (codified at 15 U. S. C. §1331).

Not only did Congress reject the proposals to grant the FDA jurisdiction, but it explicitly pre-empted any other regulation of cigarette labeling: "No statement relating to smoking and health, other than the statement required by . . . this Act, shall be required on any cigarette package." Pub. L. 89–92, §5(a), 79 Stat. 283. The regulation of product labeling, however, is an integral aspect of the FDCA, both as it existed in 1965 and today. The labeling requirements currently imposed by the FDCA, which are essentially identical to those in force in 1965, require the FDA to regulate the labeling of drugs and devices to protect the safety of consumers. See 21 U. S. C. §352; 21 U. S. C. §352 (1964 ed. and Supp. IV). As discussed earlier, the Act requires that all products bear "adequate directions for use . . . as are necessary for the protection of users," 21 U. S. C. §352(f)(1); 21 U. S. C. §352(f)(1) (1964 ed.); requires that all products provide "adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health," 21 U. S. C. § 352(f)(2); 21 U. S. C. § 352(f)(2) (1964 ed.); and deems a product misbranded "[i]f it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof," 21 U. S. C. § 352(j); 21 U. S. C. § 352(j) (1964 ed.). In this sense, the FCLAA was—and remains—incompatible with FDA regulation of tobacco products. This is not to say that the FCLAA's pre-emption provision by itself necessarily foreclosed FDA jurisdiction. See *Cipollone* v. *Liggett Group, Inc.*, 505 U. S., at 518–519. But it is an important factor in assessing whether Congress ratified the agency's position—that is, whether Congress adopted a regulatory approach to the problem of tobacco and health that contemplated no role for the FDA.

Further, the FCLAA evidences Congress' intent to preclude *any* administrative agency from exercising significant policymaking authority on the subject of smoking and health. In addition to prohibiting any additional requirements for cigarette labeling, the FCLAA provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Pub. L. 89–92, § 5(b), 79 Stat. 283. Thus, in reaction to the FTC's attempt to regulate cigarette labeling and advertising, Congress enacted a statute reserving exclusive control over both subjects to itself.

Subsequent tobacco-specific legislation followed a similar pattern. By the FCLAA's own terms, the prohibition on any additional cigarette labeling or advertising regulations relating to smoking and health was to expire July 1, 1969. See § 10, 79 Stat. 284. In anticipation of the provision's expiration, both the FCC and the FTC proposed rules governing the advertisement of cigarettes. See 34 Fed. Reg. 1959 (1969) (FCC proposed rule to "ban the broadcast of cigarette commercials by radio and television stations"); *id.*, at 7917

(FTC proposed rule requiring manufacturers to disclose on all packaging and in all print advertising "'that cigarette smoking is dangerous to health and may cause death from cancer, coronary heart disease, chronic bronchitis, pulmonary emphysema, and other diseases'"). After debating the proper role for administrative agencies in the regulation of tobacco, see generally Cigarette Labeling and Advertising—1969: Hearings before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., pt. 2 (1969), Congress amended the FCLAA by banning cigarette advertisements "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission" and strengthening the warning required to appear on cigarette packages. Public Health Cigarette Smoking Act of 1969, Pub. L. 91–222, §§4, 6, 84 Stat. 88–89. Importantly, Congress extended indefinitely the prohibition on any other regulation of cigarette labeling with respect to smoking and health (again despite the importance of labeling regulation under the FDCA). §5(a), 84 Stat. 88 (codified at 15 U. S. C. §1334(a)). Moreover, it expressly forbade the FTC from taking any action on its pending rule until July 1, 1971, and it required the FTC, if it decided to proceed with its rule thereafter, to notify Congress at least six months in advance of the rule's becoming effective. §7(a), 84 Stat. 89. As the chairman of the House committee in which the bill originated stated, "the Congress—the body elected by the people—must make the policy determinations involved in this legislation—and not some agency made up of appointed officials." 116 Cong. Rec. 7920 (1970) (remarks of Rep. Staggers).

Four years later, after Congress had transferred the authority to regulate substances covered by the Hazardous Substances Act (HSA) from the FDA to the Consumer Products Safety Commission (CPSC), the American Public Health Association, joined by Senator Moss, petitioned the CPSC to regulate cigarettes yielding more than 21 milligrams of tar. See *Action on Smoking and Health* v. *Harris*, 655 F. 2d 236, 241 (CADC 1980); R. Kluger, Ashes to Ashes 375–376 (1996). After the CPSC determined that it lacked authority under the HSA to regulate cigarettes, a District Court held that the HSA did, in fact, grant the CPSC such jurisdiction and ordered it to reexamine the petition. See *American Public Health Association* v. *Consumer Product Safety Commission,* [1972–1975 Transfer Binder] CCH Consumer Prod. Safety Guide ¶ 75,081 (DC 1975), vacated as moot, No. 75–1863 (CADC 1976). Before the CPSC could take any action, however, Congress mooted the issue by adopting legislation that eliminated the agency's authority to regulate "tobacco and tobacco products." Consumer Product Safety Commission Improvements Act of 1976, Pub. L. 94–284, § 3(c), 90 Stat. 503 (codified at 15 U. S. C. § 1261(f)(2)). Senator Moss acknowledged that the "legislation, in effect, reverse[d]" the District Court's decision, 121 Cong. Rec. 23563 (1975), and the FDA later observed that the episode was "particularly" "indicative of the policy of Congress to limit the regulatory authority over cigarettes by Federal Agencies," Letter to Action on Smoking and Health (ASH) Executive Director Banzhaf from FDA Comm'r Goyan (Nov. 25, 1980), App. 59. A separate statement in the Senate Report underscored that the legislation's purpose was to "unmistakably reaffirm the clear mandate of the Congress that the basic regulation of tobacco and tobacco products is governed by the legislation dealing with the subject, . . . and that any further regulation in this sensitive and complex area must be reserved for specific Congressional action." S. Rep. No. 94–251, p. 43 (1975) (additional views of Sens. Hartke, Hollings, Ford, Stevens, and Beall).

Meanwhile, the FDA continued to maintain that it lacked jurisdiction under the FDCA to regulate tobacco products as customarily marketed. In 1972, FDA Commissioner Edwards testified before Congress that "cigarettes recommended for smoking pleasure are beyond the Federal Food, Drug, and Cosmetic Act." 1972 Hearings 239, 242. He further stated that the FDA believed that the Public Health Cigarette Smoking Act "demonstrates that the regulation of cigarettes is to be the domain of Congress," and that "labeling or banning cigarettes is a step that can be take[n] only by the Congress. Any such move by FDA would be inconsistent with the clear congressional intent." *Ibid.*

In 1977, ASH filed a citizen petition requesting that the FDA regulate cigarettes, citing many of the same grounds that motivated the FDA's rulemaking here. See Citizen Petition, No. 77P–0185 (May 26, 1977), 10 Rec. in No. 97–1604 (CA4), Tab No. 22, pp. 1–10. ASH asserted that nicotine was highly addictive and had strong physiological effects on the body; that those effects were "intended" because consumers use tobacco products precisely to obtain those effects; and that tobacco causes thousands of premature deaths annually. *Ibid.* In denying ASH's petition, FDA Commissioner Kennedy stated that "[t]he interpretation of the Act by FDA consistently has been that cigarettes are not a drug unless health claims are made by the vendors." Letter to ASH Executive Director Banzhaf (Dec. 5, 1977), App. 47. After the matter proceeded to litigation, the FDA argued in its brief to the Court of Appeals that "cigarettes are not comprehended within the statutory definition of the term 'drug' absent objective evidence that vendors represent or intend that their products be used as a drug." Brief for Appellee in *Action on Smoking and Health* v. *Harris,* 655 F. 2d 236 (CADC 1980), 9 Rec. in No. 97–1604 (CA4), Tab No. 4, at 27–28. The FDA also contended that Congress had "long been aware that the FDA does not consider cigarettes to be within its regulatory authority in the absence of health claims made on behalf of the manufacturer or vendor," and that, because "Congress has never acted to disturb the agency's interpretation," it had "acquiesced in the FDA's interpretation of the statutory limits on its authority to regulate cigarettes." *Id.,* at 23, 27, n. 23. The Court of Appeals upheld the FDA's position, concluding that "[i]f the statute requires expansion, that is the job of Congress." *Action on Smoking and Health* v. *Harris*, 655 F. 2d, at 243. In 1980, the FDA also denied a request by ASH to commence rulemaking proceedings to establish the agency's jurisdiction to regulate cigarettes as devices. See Letter to ASH Executive Director Banzhaf from FDA Comm'r Goyan (Nov. 25, 1980), App. 50–51. The agency stated that "[i]nsofar as rulemaking would relate to cigarettes or attached filters as customarily marketed, we have concluded that FDA has no jurisdiction under section 201(h) of the Act [21 U. S. C. § 321(h)]." *Id.*, at 67.

In 1983, Congress again considered legislation on the subject of smoking and health. HHS Assistant Secretary Brandt testified that, in addition to being "a major cause of cancer," smoking is a "major cause of heart disease" and other serious illnesses, and can result in "unfavorable pregnancy outcomes." 1983 House Hearings 19–20. He also stated that it was "well-established that cigarette smoking is a drug dependence, and that smoking is addictive for many people." *Id.*, at 20. Nonetheless, Assistant Secretary Brandt maintained that "the issue of regulation of tobacco . . . is something that Congress has reserved to itself, and we do not within the Department have the authority to regulate nor are we seeking such authority." *Id.*, at 74. He also testified before the Senate, stating that, despite the evidence of tobacco's health effects and addictiveness, the Department's view was that "Congress has assumed the responsibility of regulating . . . cigarettes." Smoking Prevention and Education Act: Hearings on S. 772 before the Senate Committee on Labor and Human Resources, 98th Cong., 1st Sess., 56 (1983) (hereinafter 1983 Senate Hearings).

Against this backdrop, Congress enacted three additional tobacco-specific statutes over the next four years that incrementally expanded its regulatory scheme for tobacco products. In 1983, Congress adopted the Alcohol and Drug Abuse Amendments, Pub. L. 98–24, 97 Stat. 175 (codified at

42 U. S. C. § 290aa *et seq.*), which require the Secretary of HHS to report to Congress every three years on the "addictive property of tobacco" and to include recommendations for action that the Secretary may deem appropriate. A year later, Congress enacted the Comprehensive Smoking Education Act, Pub. L. 98–474, 98 Stat. 2200, which amended the FCLAA by again modifying the prescribed warning. Notably, during debate on the Senate floor, Senator Hawkins argued that the FCLAA was necessary in part because "[u]nder the Food, Drug and Cosmetic Act, the Congress exempted tobacco products." 130 Cong. Rec. 26953 (1984). And in 1986, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act of 1986 (CSTHEA), Pub. L. 99–252, 100 Stat. 30 (codified at 15 U. S. C. § 4401 *et seq.*), which essentially extended the regulatory provisions of the FCLAA to smokeless tobacco products. Like the FCLAA, the CSTHEA provided that "[n]o statement relating to the use of smokeless tobacco products and health, other than the statements required by [the Act], shall be required by any Federal agency to appear on any package . . . of a smokeless tobacco product." § 7(a), 100 Stat. 34 (codified at 15 U. S. C. § 4406(a)). Thus, as with cigarettes, Congress reserved for itself an aspect of smokeless tobacco regulation that is particularly important to the FDCA's regulatory scheme.

In 1988, the Surgeon General released a report summarizing the abundant scientific literature demonstrating that "[c]igarettes and other forms of tobacco are addicting," and that "nicotine is psychoactive" and "causes physical dependence characterized by a withdrawal syndrome that usually accompanies nicotine abstinence." 1988 Surgeon General's Report 14. The report further concluded that the "pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." *Id.*, at 15. In the same year, FDA Commissioner Young stated before Congress that "it doesn't look like it is possible to regulate [tobacco] under the

Food, Drug and Cosmetic Act even though smoking, I think, has been widely recognized as being harmful to human health." Rural Development, Agriculture, and Related Agencies Appropriations for 1989: Hearings before a Subcommittee of the House Committee on Appropriations, 100th Cong., 2d Sess., 409 (1988). At the same hearing, the FDA's General Counsel testified that "what is fairly important in FDA law is whether a product has a therapeutic purpose," and "[c]igarettes themselves are not used for a therapeutic purpose as that concept is ordinarily understood." *Id.,* at 410. Between 1987 and 1989, Congress considered three more bills that would have amended the FDCA to grant the FDA jurisdiction to regulate tobacco products. See H. R. 3294, 100th Cong., 1st Sess. (1987); H. R. 1494, 101st Cong., 1st Sess. (1989); S. 769, 101st Cong., 1st Sess. (1989). As before, Congress rejected the proposals. In 1992, Congress instead adopted the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. 102–321, § 202, 106 Stat. 394 (codified at 42 U. S. C. § 300x *et seq.*), which creates incentives for States to regulate the retail sale of tobacco products by making States' receipt of certain block grants contingent on their prohibiting the sale of tobacco products to minors.

Taken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products. We do not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching this conclusion. Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position. To the contrary, Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco. In doing so, Congress has been aware of tobacco's health hazards and its pharmacological effects. It has also enacted this legislation against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed. Further, Congress has persistently acted to preclude a meaningful role for *any* administrative agency in making policy on the subject of tobacco and health. Moreover, the substance of Congress' regulatory scheme is, in an important respect, incompatible with FDA jurisdiction. Although the supervision of product labeling to protect consumer health is a substantial component of the FDA's regulation of drugs and devices, see 21 U. S. C. § 352 (1994 ed. and Supp. III), the FCLAA and the CSTHEA explicitly prohibit any federal agency from imposing any health-related labeling requirements on cigarettes or smokeless tobacco products, see 15 U. S. C. §§ 1334(a), 4406(a).

Under these circumstances, it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco. As in *Bob Jones Univ.* v. *United States*, 461 U. S. 574 (1983), "[i]t is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on." *Id.*, at 600–601. Congress has affirmatively acted to address the issue of tobacco and health, relying on the representations of the FDA that it had no authority to regulate tobacco. It has created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising, and premised on the belief that the FDA lacks such jurisdiction under the FDCA. As a result, Congress' tobacco-specific statutes preclude the FDA from regulating tobacco products as customarily marketed.

Although the dissent takes issue with our discussion of the FDA's change in position, *post*, at 186–189, our conclusion does not rely on the fact that the FDA's assertion of jurisdiction represents a sharp break with its prior interpretation of the FDCA. Certainly, an agency's initial interpretation of a statute that it is charged with administering is not "carved in stone." *Chevron*, 467 U. S., at 863; see also *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). As we recognized in *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983), agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Id.*, at 42 (quoting *Permian Basin Area Rate Cases*, 390 U. S. 747, 784 (1968)). The consistency of the FDA's prior position is significant in this case for a different reason: It provides important context to Congress' enactment of its tobacco-specific legislation. When the FDA repeatedly informed Congress that the FDCA does not grant it the authority to regulate tobacco products, its statements were consistent with the agency's unwavering position since its inception, and with the position that its predecessor agency had first taken in 1914. Although not crucial, the consistency of the FDA's prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position.

The dissent also argues that the proper inference to be drawn from Congress' tobacco-specific legislation is "critically ambivalent." *Post*, at 182. We disagree. In that series of statutes, Congress crafted a specific legislative response to the problem of tobacco and health, and it did so with the understanding, based on repeated assertions by the FDA, that the agency has no authority under the FDCA to regulate tobacco products. Moreover, Congress expressly pre-empted any other regulation of the labeling of tobacco products concerning their health consequences, even though the oversight of labeling is central to the FDCA's regulatory scheme. And in addressing the subject, Congress consistently evidenced its intent to preclude any federal agency from exercising significant policymaking authority in the area. Under these circumstances, we believe the appropriate inference—that Congress intended to ratify the FDA's prior position that it lacks jurisdiction—is unmistakable.

The dissent alternatively argues that, even if Congress' subsequent tobacco-specific legislation did, in fact, ratify the FDA's position, that position was merely a contingent disavowal of jurisdiction. Specifically, the dissent contends that "the FDA's traditional view was largely premised on a perceived inability to prove the necessary statutory 'intent' requirement." *Post,* at 189–190. A fair reading of the FDA's representations prior to 1995, however, demonstrates that the agency's position was essentially unconditional. See, *e. g.,* 1972 Hearings 239, 242 (statement of Comm'r Edwards) ("[R]egulation of cigarettes is to be the domain of Congress," and "[a]ny such move by FDA would be inconsistent with the clear congressional intent"); 1983 House Hearings 74 (statement of Assistant Secretary Brandt) ("[T]he issue of regulation of tobacco . . . is something that Congress has reserved to itself"); 1983 Senate Hearings 56 (statement of Assistant Secretary Brandt) ("Congress has assumed the responsibility of regulating . . . cigarettes"); Brief for Appellee in *Action on Smoking and Health* v. *Harris,* 655 F. 2d 236 (CADC 1980), 9 Rec. in No. 97–1604 (CA4), Tab No. 4, at 27, n. 23 (because "Congress has never acted to disturb the agency's interpretation," it "acquiesced in the FDA's interpretation"). To the extent the agency's position could be characterized as equivocal, it was only with respect to the well-established exception of when the manufacturer makes express claims of therapeutic benefit. See, *e. g.,* 1965 Hearings 193 (statement of Deputy Comm'r Rankin) ("The Food and Drug Administration has no jurisdiction under the Food, Drug, and Cosmetic Act over tobacco, unless it bears drug claims"); Letter to ASH Executive Director Banzhaf from FDA Comm'r Kennedy (Dec. 5, 1977), App. 47 ("The interpretation of the Act by FDA consistently has been that cigarettes are not a drug unless health claims are made by the vendors"); Letter to ASH Executive Director Banzhaf from

FDA Comm'r Goyan (Nov. 25, 1980), *id.*, at 67 ("Insofar as rulemaking would relate to cigarettes or attached filters as customarily marketed, we have concluded that FDA has no jurisdiction"). Thus, what Congress ratified was the FDA's plain and resolute position that the FDCA gives the agency no authority to regulate tobacco products as customarily marketed.

### C

Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. See *Chevron, supra,* at 844. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. Cf. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. See Brief for Petitioners 35–36; Reply Brief for Petitioners 14. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Our decision in *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218 (1994), is instructive. That case involved the proper construction of the term "modify" in § 203(b) of the Communications Act of 1934. The FCC contended that, because the Act gave it the discretion to "modify any requirement" imposed under the statute, it therefore possessed the authority to render voluntary the otherwise mandatory requirement that long distance carriers file their rates. *Id.*, at 225. We rejected the FCC's construction, finding "not the slightest doubt" that Congress had directly spoken to the question. *Id.*, at 228. In reasoning even more apt here, we concluded that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.*, at 231.

As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of "safety" as it is used throughout the Act—a concept central to the FDCA's regulatory scheme—but also ignore the plain implication of Congress' subsequent tobacco-specific legislation. It is therefore clear, based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.

* * *

By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, *post,* at 190, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And " '[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.' " *United States* v. *Article of Drug . . . Bacto-Unidisk,* 394 U. S. 784, 800 (1969) (quoting *62 Cases of Jam* v. *United States,* 340 U. S. 593, 600 (1951)). Reading the FDCA as a whole, as well as in conjunction with Congress' subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority that it seeks to exercise here. For these reasons, the judgment of the Court of Appeals for the Fourth Circuit is affirmed.

*It is so ordered.*

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting.

The Food and Drug Administration (FDA) has the authority to regulate "articles (other than food) intended to affect the structure or any function of the body . . . ." Federal Food, Drug, and Cosmetic Act (FDCA), 21 U. S. C. § 321(g)(1)(C). Unlike the majority, I believe that tobacco products fit within this statutory language.

In its own interpretation, the majority nowhere denies the following two salient points. First, tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally. Cigarettes achieve their mood-stabilizing effects through the interaction of the chemical nicotine and the cells of the central nervous system. Both cigarette manufacturers and smokers alike know of, and desire, that chemically induced result. Hence, cigarettes are "intended to affect" the body's "structure" and "function," in the literal sense of these words.

Second, the statute's basic purpose—the protection of public health—supports the inclusion of cigarettes within its scope. See *United States* v. *Article of Drug . . . Bacto-Unidisk*, 394 U. S. 784, 798 (1969) (FDCA "is to be given *a liberal construction consistent with [its] overriding purpose to protect the public health*" (emphasis added)). Unregulated tobacco use causes "[m]ore than 400,000 people [to] die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease." 61 Fed. Reg. 44398 (1996). Indeed, tobacco products kill more people in this country every year "than . . . AIDS . . . , car accidents, alcohol, homicides, illegal drugs, suicides, and fires, *combined*." *Ibid.* (emphasis added).

Despite the FDCA's literal language and general purpose (both of which support the FDA's finding that cigarettes come within its statutory authority), the majority nonetheless reads the statute as *excluding* tobacco products for two basic reasons:

> (1) the FDCA does not "fit" the case of tobacco because the statute requires the FDA to prohibit dangerous drugs or devices (like cigarettes) outright, and the agency concedes that simply banning the sale of cigarettes is not a proper remedy, *ante*, at 139–141; and
>
> (2) Congress has enacted other statutes, which, when viewed in light of the FDA's long history of denying

> tobacco-related jurisdiction and considered together with Congress' failure explicitly to grant the agency tobacco-specific authority, demonstrate that Congress did not intend for the FDA to exercise jurisdiction over tobacco, *ante*, at 155–156.

In my view, neither of these propositions is valid. Rather, the FDCA does not significantly limit the FDA's remedial alternatives. See *infra*, at 174–181. And the later statutes do not tell the FDA it cannot exercise jurisdiction, but simply leave FDA jurisdictional law where Congress found it. See *infra*, at 181–186; cf. Food and Drug Administration Modernization Act of 1997, 111 Stat. 2380 (codified at note following 21 U. S. C. § 321 (1994 ed., Supp. III)) (statute "shall" *not* "be construed to affect the question of whether" the FDA "has any authority to regulate any tobacco product").

The bulk of the opinion that follows will explain the basis for these latter conclusions. In short, I believe that the most important indicia of statutory meaning—language and purpose—along with the FDCA's legislative history (described briefly in Part I) are sufficient to establish that the FDA has authority to regulate tobacco. The statute-specific arguments against jurisdiction that the tobacco companies and the majority rely upon (discussed in Part II) are based on erroneous assumptions and, thus, do not defeat the jurisdiction-supporting thrust of the FDCA's language and purpose. The inferences that the majority draws from later legislative history are not persuasive, since (as I point out in Part III) one can just as easily infer from the later laws that Congress did not intend to affect the FDA's tobacco-related authority at all. And the fact that the FDA changed its mind about the scope of its own jurisdiction is legally insignificant because (as Part IV establishes) the agency's reasons for changing course are fully justified. Finally, as I explain in Part V, the degree of accountability that likely will attach to the FDA's action in this case should alleviate any concern that Congress, rather than an administrative agency, ought to make this important regulatory decision.

## I

Before 1938, the federal Pure Food and Drug Act contained only two jurisdictional definitions of "drug":

> "[1] medicines and preparations recognized in the United States Pharmacopoeia or National Formulary . . . and [2] any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease." Act of June 30, 1906, ch. 3915, § 6, 34 Stat. 769.

In 1938, Congress added a third definition, relevant here:

> "(3) articles (other than food) intended to affect the structure or any function of the body . . . ." Act of June 25, 1938, ch. 675, § 201(g), 52 Stat. 1041 (codified at 21 U. S. C. § 321(g)(1)(C)).

It also added a similar definition in respect to a "device." See § 201(h), 52 Stat. 1041 (codified at 21 U. S. C. § 321(h)). As I have mentioned, the literal language of the third definition and the FDCA's general purpose both strongly support a projurisdiction reading of the statute. See *supra,* at 161–162.

The statute's history offers further support. The FDA drafted the new language, and it testified before Congress that the third definition would expand the FDCA's jurisdictional scope significantly. See Hearings on S. 1944 before a Subcommittee of the Senate Committee on Commerce, 73d Cong., 2d Sess., 15–16 (1933), reprinted in 1 FDA, Legislative History of the Federal Food, Drug, and Cosmetic Act and Its Amendments 107–108 (1979) (hereinafter Leg. Hist.). Indeed, "[t]he purpose" of the new definition was to "make possible the regulation of a great many products that have been found on the market that cannot be alleged to be treatments for diseased conditions." *Id.,* at 108. While the drafters focused specifically upon the need to give the FDA jurisdiction over "slenderizing" products such as "antifat remedies," *ibid.*, they were aware that, in doing so, they had created what was "admittedly an inclusive, a wide definition," *id.*, at 107. And that broad language was included *deliberately*, so that jurisdiction could be had over "*all* substances and preparations, other than food, and *all* devices intended to affect the structure or any function of the body . . . ." *Ibid.* (emphasis added); see also Hearings on S. 2800 before the Senate Committee on Commerce, 73d Cong., 2d Sess., 516 (1934), reprinted in 2 Leg. Hist. 519 (statement of then-FDA Chief Walter Campbell acknowledging that "[t]his definition of 'drugs' is all-inclusive").

After studying the FDCA's history, experts have written that the statute "is a purposefully broad delegation of discretionary powers by Congress," 1 J. O'Reilly, Food and Drug Administration §6.01, p. 6–1 (2d ed. 1995) (hereinafter O'Reilly), and that, in a sense, the FDCA "must be regarded as a *constitution*" that "establish[es] general principles" and "permit[s] implementation within broad parameters" so that the FDA can "implement these objectives through the most effective and efficient controls that can be devised." Hutt, Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act, 28 Food Drug Cosm. L. J. 177, 178–179 (1973) (emphasis added). This Court, too, has said that the

> "historical expansion of the definition of drug, and the creation of a parallel concept of devices, clearly show . . . that Congress fully intended that the Act's coverage be as broad as its literal language indicates—and equally clearly, broader than any strict medical definition might otherwise allow." *Bacto-Unidisk*, 394 U. S., at 798.

That Congress would grant the FDA such broad jurisdictional authority should surprise no one. In 1938, the President and much of Congress believed that federal administrative agencies needed broad authority and would exercise that authority wisely—a view embodied in much Second New

Deal legislation. Cf. *Gray* v. *Powell,* 314 U. S. 402, 411–412 (1941) (Congress "could have legislated specifically" but decided "to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable" determination). Thus, at around the same time that it added the relevant language to the FDCA, Congress enacted laws granting other administrative agencies even broader powers to regulate much of the Nation's transportation and communication. See, *e. g.,* Civil Aeronautics Act of 1938, ch. 601, § 401(d)(1), 52 Stat. 987 (Civil Aeronautics Board to regulate airlines within confines of highly general "public convenience and necessity" standard); Motor Carrier Act of 1935, ch. 498, § 204(a)(1), 49 Stat. 546 (Interstate Commerce Commission to establish "reasonable requirements" for trucking); Communications Act of 1934, ch. 652, § 201(a), 48 Stat. 1070 (Federal Communications Commission (FCC) to regulate radio, later television, within confines of even broader "public interest" standard). Why would the 1938 New Deal Congress suddenly have hesitated to delegate to so well established an agency as the FDA all of the discretionary authority that a straightforward reading of the relevant statutory language implies?

Nor is it surprising that such a statutory delegation of power could lead after many years to an assertion of jurisdiction that the 1938 legislators might not have expected. Such a possibility is inherent in the very nature of a broad delegation. In 1938, it may well have seemed unlikely that the FDA would ever bring cigarette manufacturers within the FDCA's statutory language by proving that cigarettes produce chemical changes in the body and that the makers "intended" their product chemically to affect the body's "structure" or "function." Or, back then, it may have seemed unlikely that, even assuming such proof, the FDA actually would exercise its discretion to regulate so popular a product. See R. Kluger, Ashes to Ashes 105 (1997) (in the 1930's "Americans were in love with smoking . . .").

But it should not have seemed unlikely that, assuming the FDA decided to regulate and proved the particular jurisdictional prerequisites, the courts would rule such a jurisdictional assertion fully authorized. Cf. *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 172 (1968) (reading Communications Act of 1934 as authorizing FCC jurisdiction to regulate cable systems while noting that "Congress could not in 1934 have foreseen the development of" advanced communications systems). After all, this Court has read more narrowly phrased statutes to grant what might have seemed even more unlikely assertions of agency jurisdiction. See, *e. g.*, *Permian Basin Area Rate Cases*, 390 U. S. 747, 774–777 (1968) (statutory authority to regulate interstate "transportation" of natural gas includes authority to regulate "prices" charged by field producers); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 677–684 (1954) (independent gas producer subject to regulation despite Natural Gas Act's express exemption of gathering and production facilities).

I shall not pursue these general matters further, for neither the companies nor the majority denies that the FDCA's literal language, its general purpose, and its particular legislative history favor the FDA's present jurisdictional view. Rather, they have made several specific arguments in support of one basic contention: Even if the statutory delegation is broad, it is not broad *enough* to include tobacco. I now turn to each of those arguments.

## II

### A

The tobacco companies contend that the FDCA's words cannot possibly be read to mean what they literally say. The statute defines "device," for example, as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article . . . intended to affect the structure or any function of the body . . . ." 21

U. S. C. § 321(h). Taken literally, this definition might include everything from room air conditioners to thermal pajamas. The companies argue that, to avoid such a result, the meaning of "drug" or "device" should be confined to *medical* or *therapeutic* products, narrowly defined. See Brief for Respondent United States Tobacco Co. 8–9.

The companies may well be right that the statute should not be read to cover room air conditioners and winter underwear. But I do not agree that we must accept their proposed limitation. For one thing, such a cramped reading contravenes the established purpose of the statutory language. See *Bacto-Unidisk,* 394 U. S., at 798 (third definition is "clearly, broader than any strict medical definition"); 1 Leg. Hist. 108 (definition covers products "that cannot be alleged to be treatments for diseased conditions"). For another, the companies' restriction would render the other two "drug" definitions superfluous. See 21 U. S. C. §§ 321(g)(1)(A), (g)(1)(B) (covering articles in the leading pharmacology compendia and those "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease").

Most importantly, the statute's language itself supplies a different, more suitable, limitation: that a "drug" must be a *chemical* agent. The FDCA's "device" definition states that an article which affects the structure or function of the body is a "device" only if it "does *not* achieve its primary intended purposes through chemical action within . . . the body," and "is *not* dependent upon being metabolized for the achievement of its primary intended purposes." § 321(h) (emphasis added). One can readily infer from this language that at least an article that *does* achieve its primary purpose through chemical action within the body and that *is* dependent upon being metabolized is a "drug," provided that it otherwise falls within the scope of the "drug" definition. And one need not hypothesize about air conditioners or thermal pajamas to recognize that the chemical nicotine, an important tobacco ingredient, meets this test.

Although I now oversimplify, the FDA has determined that once nicotine enters the body, the blood carries it almost immediately to the brain. See 61 Fed. Reg. 44698–44699 (1966). Nicotine then binds to receptors on the surface of brain cells, setting off a series of chemical reactions that alter one's mood and produce feelings of sedation and stimulation. See *id.*, at 44699, 44739. Nicotine also increases the number of nicotinic receptors on the brain's surface, and alters its normal electrical activity. See *id.*, at 44739. And nicotine stimulates the transmission of a natural chemical that "rewards" the body with pleasurable sensations (dopamine), causing nicotine addiction. See *id.*, at 44700, 44721–44722. The upshot is that nicotine stabilizes mood, suppresses appetite, tranquilizes, and satisfies a physical craving that nicotine itself has helped to create—all through chemical action within the body after being metabolized.

This physiology—and not simply smoker psychology—helps to explain why as many as 75% of adult smokers believe that smoking "reduce[s] nervous irritation," 60 Fed. Reg. 41579 (1995); why 73% of young people (10- to 22-year-olds) who begin smoking say they do so for "relaxation," 61 Fed. Reg. 44814 (1996); and why less than 3% of smokers succeed in quitting each year, although 70% want to quit, *id.*, at 44704. That chemistry also helps to explain the Surgeon General's findings that smokers believe "smoking [makes them] feel better" and smoke more "in situations involving negative mood." *Id.*, at 44814. And, for present purposes, that chemistry demonstrates that nicotine affects the "structure" and "function" of the body in a manner that is quite similar to the effects of other regulated substances. See *id.*, at 44667 (FDA regulates Valium, NoDoz, weight-loss products). Indeed, addiction, sedation, stimulation, and weight loss are *precisely* the kinds of product effects that the FDA typically reviews and controls. And, since the nicotine in cigarettes plainly is not a "food," its chemical effects suffice to establish that it is as a "drug" (and the cigarette that delivers it a drug-delivery "device") for the purpose of the FDCA.

## B

The tobacco companies' principal definitional argument focuses upon the statutory word "intended." See 21 U. S. C. § 321(g)(1)(C). The companies say that "intended" in this context is a term of art. See Brief for Respondent Brown & Williamson Tobacco Corp. 2. They assert that the statutory word "intended" means that the product's maker has made an *express claim* about the effect that its product will have on the body. *Ibid.* Indeed, according to the companies, the FDA's inability to prove that cigarette manufacturers make such claims is precisely why that agency historically has said it lacked the statutory power to regulate tobacco. See *id.*, at 19–20.

The FDCA, however, does not use the word "claimed"; it uses the word "intended." And the FDA long ago issued regulations that say the relevant "intent" can be shown not only by a manufacturer's "expressions," *but also* "by the circumstances surrounding the distribution of the article." 41 Fed. Reg. 6896 (1976) (codified at 21 CFR § 801.4 (1999)); see also 41 Fed. Reg. 6896 (1976) ("objective intent" shown if "article is, with the knowledge [of its makers], offered and used" for a particular purpose). Thus, even in the absence of express claims, the FDA has regulated products that affect the body if the manufacturer wants, and knows, that consumers so use the product. See, *e. g.,* 60 Fed. Reg. 41527–41531 (1995) (describing agency's regulation of topical hormones, sunscreens, fluoride, tanning lamps, thyroid in food supplements, novelty condoms—all marketed without express claims); see also 1 O'Reilly § 13.04, at 13–15 ("Sometimes the very nature of the material makes it a drug . . .").

Courts ordinarily reverse an agency interpretation of this kind only if Congress has clearly answered the interpretive question or if the agency's interpretation is unreasonable. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). The companies, in an effort to argue the former, point to language in the legislative history tying the word "intended" to a technical concept called "intended use." But nothing in Congress' discussion either of "intended" or "intended use" suggests that an express claim (which *often* shows intent) is *always* necessary. Indeed, the primary statement to which the companies direct our attention says only that a manufacturer can determine what kind of regulation applies—"food" or "drug"—because, "through his representations in connection with its sale, [the manufacturer] can determine" whether an article is to be used as a "food," as a "drug," or as "both." S. Rep. No. 361, 74th Cong., 1st Sess., 4 (1935), reprinted in 3 Leg. Hist. 696.

Nor is the FDA's "objective intent" interpretation unreasonable. It falls well within the established scope of the ordinary meaning of the word "intended." See *Agnew* v. *United States*, 165 U. S. 36, 53 (1897) (intent encompasses the known consequences of an act). And the companies acknowledge that the FDA can regulate a drug-like substance in the ordinary circumstance, *i. e.*, where the manufacturer makes an express claim, so it is not unreasonable to conclude that the agency retains such power where a product's effects on the body are so well known (say, like those of aspirin or calamine lotion), that there is no *need* for express representations because the product speaks for itself.

The companies also cannot deny that the evidence of their intent is sufficient to satisfy the statutory word "intended" as the FDA long has interpreted it. In the first place, there was once a time when they actually *did* make express advertising claims regarding tobacco's mood-stabilizing and weight-reducing properties—and historical representations can portend present expectations. In the late 1920's, for example, the American Tobacco Company urged weight-conscious smokers to "'Reach for a Lucky instead of a sweet.'" Kluger, Ashes to Ashes, at 77–78. The advertisements of R J Reynolds (RJR) emphasized mood stability by depicting a pilot remarking that "'It Takes Steady Nerves to Fly the Mail at Night . . . . That's why I smoke Camels. And I smoke plenty!'" *Id.*, at 86. RJR also advertised the stimulating quality of cigarettes, stating in one instance that "'You get a Lift with a Camel,'" and, in another, that Camels are "'A Harmless Restoration of the Flow of Natural Body Energy.'" *Id.*, at 87. And claims of medical proof of mildness (and of other beneficial effects) once were commonplace. See, *e. g., id.*, at 93 (Brown & Williamson advertised Kool-brand mentholated cigarettes as "a tonic to hot, tired throats"); *id.*, at 101, 131 (Philip Morris contended that "'[r]ecognized laboratory tests have conclusively proven the advantage of Phillip *[sic]* Morris'"); *id.*, at 88 (RJR proclaimed "'For Digestion's sake, smoke Camels! . . . Camels make mealtime more pleasant—digestion is stimulated—alkalinity increased'"). Although in recent decades cigarette manufacturers have stopped making express health claims in their advertising, consumers have come to understand what the companies no longer need to express—that through chemical action cigarettes stabilize mood, sedate, stimulate, and help suppress appetite.

Second, even though the companies refused to acknowledge publicly (until only very recently) that the nicotine in cigarettes has chemically induced, and habit-forming, effects, see, *e. g.*, Regulation of Tobacco Products (Part 1): Hearings before the House Subcommittee on Health and the Environment, 103d Cong., 2d Sess., 628 (1994) (hereinafter 1994 Hearings) (heads of seven major tobacco companies testified under oath that they believed "nicotine is *not* addictive" (emphasis added)), the FDA recently has gained access to solid, documentary evidence proving that cigarette manufacturers have long *known* tobacco produces these effects within the body through the metabolizing of chemicals, and that they have long *wanted* their products to produce those effects in this way.

For example, in 1972, a tobacco-industry scientist explained that " '[s]moke is beyond question the most optimized vehicle of nicotine,' " and " 'the cigarette is the most optimized dispenser of smoke.' " 61 Fed. Reg. 44856 (1996) (emphasis deleted). That same scientist urged company executives to

> " '[t]hink of the cigarette pack as a storage container for a day's supply of nicotine. . . . Think of the cigarette as a dispenser for a dose unit of nicotine [and] [t]hink of a puff of smoke as the vehicle of nicotine.' " *Ibid.* (Philip Morris) (emphasis deleted).

That same year, other tobacco industry researchers told their superiors that

> " 'in different situations and at different dose levels, nicotine appears to act as a stimulant, depressant, tranquilizer, psychic energizer, appetite reducer, anti-fatigue agent, or energizer. . . . Therefore, [tobacco] products may, in a sense, compete with a variety of other products with certain types of drug action.' " *Id.*, at 44669 (RJR) (emphasis deleted).

A draft report prepared by authorities at Philip Morris said that nicotine

> " 'is a physiologically active, nitrogen containing substance [similar to] quinine, cocaine, atropine and morphine. [And] [w]hile each of these [other] substances can be used to affect human physiology, nicotine has a particularly broad range of influence.' " *Id.*, at 44668–44669.

And a 1980 manufacturer's study stated that

> " 'the pharmacological response of smokers to nicotine is believed to be responsible for an individual's smoking

> behaviour, providing the motivation for and the degree of satisfaction required by the smoker.'" *Id.*, at 44936 (Brown & Williamson).

With such evidence, the FDA has more than sufficiently established that the companies "intend" their products to "affect" the body within the meaning of the FDCA.

### C

The majority nonetheless reaches the "inescapable conclusion" that the language and structure of the FDCA as a whole "simply do not fit" the kind of public health problem that tobacco creates. *Ante*, at 143. That is because, in the majority's view, the FDCA requires the FDA to ban outright "dangerous" drugs or devices (such as cigarettes); yet, the FDA concedes that an immediate and total cigarette-sale ban is inappropriate. *Ibid.*

This argument is curious because it leads with similarly "inescapable" force to precisely the opposite conclusion, namely, that the FDA *does* have jurisdiction but that it must ban cigarettes. More importantly, the argument fails to take into account the fact that a statute interpreted as requiring the FDA to pick a more dangerous over a less dangerous remedy would be a perverse statute, *causing*, rather than preventing, unnecessary harm whenever a total ban is likely the more dangerous response. And one can at least imagine such circumstances.

Suppose, for example, that a commonly used, mildly addictive sleeping pill (or, say, a kind of popular contact lens), plainly within the FDA's jurisdiction, turned out to pose serious health risks for certain consumers. Suppose further that many of those addicted consumers would ignore an immediate total ban, turning to a potentially more dangerous black-market substitute, while a less draconian remedy (say, adequate notice) would wean them gradually away to a safer product. Would the FDCA still *force* the FDA to impose the more dangerous remedy? For the following reasons, I think not.

First, the statute's language does not restrict the FDA's remedial powers in this way. The FDCA permits the FDA to regulate a "combination product"—*i. e.*, a "device" (such as a cigarette) that contains a "drug" (such as nicotine)—under its "device" provisions. 21 U. S. C. § 353(g)(1). And the FDCA's "device" provisions explicitly grant the FDA wide remedial discretion. For example, where the FDA cannot "otherwise" obtain "reasonable assurance" of a device's "safety and effectiveness," the agency may restrict by regulation a product's "sale, distribution, or use" upon "*such . . . conditions as the Secretary may prescribe.*" § 360j(e)(1) (emphasis added). And the statutory section that most clearly addresses the FDA's power to ban (entitled "Banned devices") says that, where a device presents "an unreasonable and substantial risk of illness or injury," the Secretary "*may*"—not *must*—"initiate a proceeding . . . to make such device a banned device." § 360f(a) (emphasis added).

The Court points to other statutory subsections which it believes require the FDA to ban a drug or device entirely, even where an outright ban risks more harm than other regulatory responses. See *ante,* at 135–136. But the cited provisions do no such thing. It is true, as the majority contends, that "the FDCA requires the FDA to place all devices" in "one of three classifications" and that Class III devices require "premarket approval." *Ante,* at 136. But it is not the case that the FDA *must* place cigarettes in Class III because tobacco itself "presents a potential unreasonable risk of illness or injury." 21 U. S. C. § 360c(a)(1)(C). In fact, Class III applies *only* where *regulation* cannot otherwise "provide reasonable assurance of . . . safety." §§ 360c(a)(1)(A), (B) (placing a device in Class I or Class II when regulation can provide that assurance). Thus, the statute plainly allows the FDA to consider the relative, overall "safety" of a device in light of its regulatory alternatives, and where the FDA has chosen the least dangerous path, *i. e.,* the safest path, then it can—and does—provide a "reasonable assurance" of "safety" within the meaning of the statute. A good football helmet provides a reasonable assurance of safety for the player even if the sport itself is still dangerous. And the safest regulatory choice by definition offers a "reasonable" assurance of safety in a world where the other alternatives are yet more dangerous.

In any event, it is not entirely clear from the statute's text that a Class III categorization would require the FDA affirmatively to *withdraw* from the market dangerous devices, such as cigarettes, which are already widely distributed. See, *e. g.,* § 360f(a) (when a device presents an "unreasonable and substantial risk of illness or injury," the Secretary "may" make it "a banned device"); § 360h(a) (when a device "presents an unreasonable risk of substantial harm to the public health," the Secretary "may" require "notification"); § 360h(b) (when a defective device creates an "unreasonable risk" of harm, the Secretary "may" order "[r]epair, replacement, or refund"); cf. 2 O'Reilly § 18.08, at 18–29 (point of Class III "premarket approval" is to allow "careful scientific review" of each "truly new" device "*before* it is exposed" to users (emphasis added)).

Noting that the FDCA requires banning a "misbranded" drug, the majority also points to 21 U. S. C. § 352(j), which deems a drug or device "misbranded" if "it is dangerous to health when used" as "prescribed, recommended, or suggested in the labeling." See *ante,* at 135. In addition, the majority mentions § 352(f)(1), which calls a drug or device "misbranded" unless "its labeling bears . . . adequate directions for use" as "are necessary for the protection of users." *Ibid.* But this "misbranding" language is not determinative, for it permits the FDA to conclude that a drug or device is *not* "dangerous to health" and that it *does* have "adequate" directions *when regulated so as to render it as harmless as possible.* And surely the agency can determine that a substance is comparatively "safe" (*not* "dangerous") whenever it would be *less* dangerous to make the product available (subject to regulatory requirements) than suddenly to withdraw it from the market. Any other interpretation risks substantial harm of the sort that my sleeping pill example illustrates. See *supra,* at 174–175. And nothing in the statute prevents the agency from adopting a view of "safety" that would avoid such harm. Indeed, the FDA already seems to have taken this position when permitting distribution of toxic drugs, such as poisons used for chemotherapy, that are dangerous for the user but are not deemed "dangerous to health" in the relevant sense. See 61 Fed. Reg. 44413 (1996).

The tobacco companies point to another statutory provision which says that if a device "would cause serious, adverse health consequences or death, the Secretary *shall* issue" a cease distribution order. 21 U. S. C. § 360h(e)(1) (emphasis added). But that word "shall" in this context cannot mean that the Secretary must resort to the recall remedy *whenever* a device would have serious, adverse health effects. Rather, that language must mean that the Secretary "shall issue" a cease distribution order in compliance with the section's procedural requirements *if* the Secretary chooses *in her discretion* to use that particular subsection's recall remedy. Otherwise, the subsection would trump and make meaningless the same section's provision of other lesser remedies such as simple "notice" (which the Secretary similarly can impose if, but only if, she finds that the device "presents an unreasonable risk of substantial harm to the public"). § 360h(a)(1). And reading the statute to compel the FDA to "recall" every dangerous device likewise would conflict with that same subsection's statement that the recall remedy "shall be *in addition to* [the other] remedies provided" in the statute. § 360h(e)(3) (emphasis added).

The statute's language, then, permits the agency to choose remedies consistent with its basic purpose—the overall protection of public health.

The second reason the FDCA does not require the FDA to select the more dangerous remedy, see *supra,* at 175, is that, despite the majority's assertions to the contrary, the statute does not distinguish among the kinds of health effects that the agency may take into account when assessing safety. The Court insists that the statute only permits the agency to take into account the health risks and benefits of the "*product itself*" as used by individual consumers, *ante,* at 140, and, thus, that the FDA is prohibited from considering that a ban on smoking would lead many smokers to suffer severe withdrawal symptoms or to buy possibly stronger, more dangerous, black market cigarettes—considerations that the majority calls "the aggregate health effects of alternative administrative actions." *Ibid.* But the FDCA expressly *permits* the FDA to take account of comparative safety in precisely this manner. See, *e. g.,* 21 U. S. C. § 360h(e)(2)(B)(i)(II) (no device recall if "risk of recal[l]" presents "a greater health risk than" no recall); § 360h(a) (notification "unless" notification "would present a greater danger" than "no such notification").

Moreover, one cannot distinguish in this context between a "specific" health risk incurred by an individual and an "aggregate" risk to a group. *All* relevant risk is, at bottom, risk to an individual; *all* relevant risk attaches to "the product itself"; and *all* relevant risk is "aggregate" in the sense that the agency aggregates health effects in order to determine risk to the individual consumer. If unregulated smoking will kill 4 individuals out of a typical group of 1,000 people, if regulated smoking will kill 1 out of 1,000, and if a smoking ban (because of the black market) will kill 2 out of 1,000; then these three possibilities mean that in each group four, one, and two individuals, on average, will die respectively. And the risk to each individual consumer is 4/1,000, 1/1,000, and 2/1,000 respectively. A "specific" risk to an individual consumer and "aggregate" risks are two sides of the same coin; each calls attention to the same set of facts. While there may be a theoretical distinction between the risk of the product itself and the risk related to the presence or absence of an intervening voluntary act (*e. g.*, the search for a replacement on the black market), the majority does not rely upon any such distinction, and the FDA's history of regulating "replacement" drugs such as methadone shows that it has long taken likely actual alternative consumer behavior into account.

I concede that, as a matter of logic, one could consider the FDA's "safety" evaluation to be different from its choice of remedies. But to read the statute to forbid the agency from taking account of the realities of consumer behavior either in assessing safety or in choosing a remedy could increase the risks of harm—doubling the risk of death to each "individual user" in my example above. Why would Congress insist that the FDA ignore such realities, even if the consequent harm would occur only unusually, say, where the FDA evaluates a product (a sleeping pill; a cigarette; a contact lens) that is already on the market, potentially habit forming, or popular? I can find no satisfactory answer to this question. And that, I imagine, is why the statute itself says nothing about any of the distinctions that the Court has tried to draw. See 21 U. S. C. § 360c(a)(2) (instructing FDA to determine the safety and effectiveness of a "device" in part by weighing "*any* probable benefit to health . . . against *any* probable risk of injury or illness . . ." (emphasis added)).

Third, experience counsels against an overly rigid interpretation of the FDCA that is divorced from the statute's overall health-protecting purposes. A different set of words, added to the FDCA in 1958 by the Delaney Amendment, provides that "no [food] additive shall be deemed to be safe if it is found [after appropriate tests] to induce cancer when ingested by man or animal." § 348(c)(3). The FDA once interpreted this language as requiring it to ban any food additive, no matter how small the amount, that appeared in any food product if that additive was ever found to induce cancer in any animal, no matter how large a dose needed to induce the appearance of a single carcinogenic cell. See H. R. Rep. No. 95–658, p. 7 (1977) (discussing agency's view). The FDA believed that the statute's ban mandate was absolute and prevented it from establishing a level of "safe use" or even to judge whether "the benefits of continued use outweigh the risks involved." *Id.*, at 5. This interpretation—which in principle could have required the ban of everything from herbal teas to mushrooms—actually led the FDA to ban saccharine, see 42 Fed. Reg. 19996 (1977), though this extremely controversial regulatory response never took effect because Congress enacted, and has continually renewed, a law postponing the ban. See Saccharin Study and Labeling Act, Pub. L. 95–203, § 3, 91 Stat. 1452; *e. g.*, Pub. L. 102–142, Tit. VI, 105 Stat. 910.

The Court's interpretation of the statutory language before us risks Delaney-type consequences with even less linguistic reason. Even worse, the view the Court advances undermines the FDCA's overall health-protecting purpose by placing the FDA in the strange dilemma of either banning completely a potentially dangerous drug or device or doing nothing at all. Saying that I have misunderstood its conclusion, the majority maintains that the FDA "may clearly regulate many 'dangerous' products without banning them." *Ante*, at 142. But it then adds that the FDA *must* ban—rather than otherwise regulate—a drug or device that "cannot be used safely for any therapeutic purpose." *Ibid.* If I misunderstand, it is only because this linchpin of the majority's conclusion remains unexplained. *Why* must a widely used but unsafe device be withdrawn from the market when that particular remedy threatens the health of many and is thus more dangerous than another regulatory response? It is, indeed, a perverse interpretation that reads the FDCA to require the ban of a device that has no "safe" therapeutic purpose where a ban is the most dangerous remedial alternative.

In my view, where linguistically permissible, we should interpret the FDCA in light of Congress' overall desire to protect health. That purpose requires a flexible interpretation that both permits the FDA to take into account the realities of human behavior and allows it, in appropriate cases, to choose from its arsenal of statutory remedies. A statute so interpreted easily "fit[s]" this, and other, drug- and device-related health problems.

## III

In the majority's view, laws enacted since 1965 require us to deny jurisdiction, whatever the FDCA might mean in their absence. But why? Do those laws contain language barring FDA jurisdiction? The majority must concede that they do not. Do they contain provisions that are inconsistent with the FDA's exercise of jurisdiction? With one exception, see *infra,* at 184–185, the majority points to no such provision. Do they somehow repeal the principles of law (discussed in Part II, *supra*) that otherwise would lead to the conclusion that the FDA has jurisdiction in this area? The companies themselves deny making any such claim. See Tr. of Oral Arg. 27 (denying reliance on doctrine of "partial repeal"). Perhaps the later laws "shape" and "focus" what the 1938 Congress meant a generation earlier. *Ante,* at 143. But this Court has warned against using the views of a later Congress to construe a statute enacted many years before. See *Pension Benefit Guaranty Corporation* v. *LTV Corp.,* 496 U. S. 633, 650 (1990) (later history is a " 'hazardous basis for inferring the intent of an earlier' Congress" (quoting *United States* v. *Price,* 361 U. S. 304, 313 (1960))). And, while the majority suggests that the subsequent history "control[s] our construction" of the FDCA, see *ante,* at 143 (citation and internal quotation marks omitted), this Court expressly has held that such subsequent views are not "controlling." *Haynes* v. *United States,* 390 U. S. 85, 87–88, n. 4 (1968); accord, *Southwestern Cable Co.,* 392 U. S., at 170 (such views have " 'very little, if any, significance' "); see also *Sullivan* v. *Finkelstein,* 496 U. S. 617, 632 (1990) (SCALIA, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").

Regardless, the later statutes do not support the majority's conclusion. That is because, whatever individual Members of Congress after 1964 may have assumed about the FDA's jurisdiction, the laws they enacted did not embody any such "no jurisdiction" assumption. And one cannot automatically *infer* an antijurisdiction intent, as the majority does, for the later statutes are both (and similarly) consistent with quite a different congressional desire, namely, the intent to proceed without interfering with whatever authority the FDA otherwise may have possessed. See, *e. g.,* Cigarette Labeling and Advertising—1965: Hearings on H. R. 2248 et al. before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., 19 (1965) (hereinafter 1965 Hearings) (statement of Rep. Fino that the proposed legislation would *not* "erode" agency authority). As I demonstrate below, the subsequent legislative history is critically ambivalent, for it can be read *either* as (a) "ratif[ying]" a no-jurisdiction assumption, see *ante,* at 158, *or* as (b) leaving the jurisdictional question just where Congress found it. And the fact that both inferences are "equally tenable," *Pension Benefit Guaranty Corp., supra,* at 650 (citation and internal quotation marks omitted); *Johnson* v. *Transportation Agency, Santa Clara Cty.,* 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting), prevents the majority from drawing from the later statutes the firm, antijurisdiction implication that it needs.

Consider, for example, Congress' failure to provide the FDA with express authority to regulate tobacco—a circumstance that the majority finds significant. See *ante*, at 144, 147–148, 155. But cf. *Southwestern Cable Co.*, *supra*, at 170 (failed requests do not prove agency "did not already possess" authority). In fact, Congress *both* failed to grant express authority to the FDA when the FDA denied it had jurisdiction over tobacco *and* failed to take that authority expressly away when the agency later asserted jurisdiction. See, *e. g.*, S. 1262, 104th Cong., 1st Sess., § 906 (1995) (failed bill seeking to amend FDCA to say that "[n]othing in this Act or any other Act shall provide the [FDA] with any authority to regulate in any manner tobacco or tobacco products"); see also H. R. 516, 105th Cong., 1st Sess., § 2 (1997) (similar); H. R. Res. 980, reprinted in 142 Cong. Rec. 5018 (1996) (Georgia legislators unsuccessfully requested that Congress "rescind any action giving the FDA authority" over tobacco); H. R. 2283, 104th Cong., 1st Sess. (1995) (failed bill "[t]o prohibit the [FDA] regulation of the sale or use of tobacco"); H. R. 2414, 104th Cong., 1st Sess., § 2(a) (1995) (similar). Consequently, the defeat of various different proposed jurisdictional changes proves nothing. This history shows only that Congress could not muster the votes necessary either to grant or to deny the FDA the relevant authority. It neither favors nor disfavors the majority's position.

The majority also mentions the speed with which Congress acted to take jurisdiction away from other agencies once they tried to assert it. See *ante*, at 145, 149–151. But such a congressional response again proves nothing. On the one hand, the speedy reply might suggest that Congress somehow resented agency assertions of jurisdiction in an area it desired to reserve for itself—a consideration that supports the majority. On the other hand, Congress' quick reaction with respect to *other* agencies' regulatory efforts contrasts dramatically with its failure to enact any responsive law (at any speed) after the FDA asserted jurisdiction over tobacco more than three years ago. And that contrast supports the opposite conclusion.

In addition, at least one post-1938 statute reveals quite a different congressional intent than the majority infers. See note following 21 U. S. C. § 321 (1994 ed., Supp. III) (FDA Modernization Act of 1997) (law "shall *[not]* be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product," and "[s]uch authority, if any, shall be exercised under the [FDCA] as in effect on the day before the date of [this] enactment"). Consequently, it appears that the only interpretation that can reconcile *all* of the subsequent statutes is the inference that Congress did not intend, either explicitly or implicitly, for its later laws to answer the question of the scope of the FDA's jurisdictional authority. See 143 Cong. Rec. S8860 (Sept. 5, 1997) (the Modernization Act will "not interfere or substantially negatively affect any of the FDA tobacco authority").

The majority's historical perspective also appears to be shaped by language in the Federal Cigarette Labeling and Advertising Act (FCLAA), 79 Stat. 282, 15 U. S. C. § 1331 *et seq.* See *ante,* at 148–149. The FCLAA requires manufacturers to place on cigarette packages, etc., health warnings such as the following:

> "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy." 15 U. S. C. § 1333(a).

The FCLAA has an express pre-emption provision which says that "[n]o statement relating to smoking and health, other than the statement required by [this Act], shall be required on any cigarette package." § 1334(a). This pre-emption clause plainly prohibits the FDA from requiring on "any cigarette package" any other "statement relating to smoking and health," but no one contends that the FDA has failed to abide by this prohibition. See, *e. g.,* 61 Fed. Reg. 44399 (1996) (describing the other regulatory prescriptions). Rather, the question is whether the FCLAA's pre-emption provision does *more*. Does it forbid the FDA to regulate at all?

This Court has already answered that question expressly and in the negative. See *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504 (1992). *Cipollone* held that the FCLAA's pre-emption provision does not bar state or federal regulation outside the provision's literal scope. *Id.*, at 518. And it described the pre-emption provision as "merely prohibit[ing] state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels . . . ." *Ibid.*

This negative answer is fully consistent with Congress' intentions in regard to the pre-emption language. When Congress enacted the FCLAA, it focused upon the regulatory efforts of the Federal Trade Commission (FTC), not the FDA. See 1965 Hearings 1–2. And the Public Health Cigarette Smoking Act of 1969, Pub. L. 91–222, § 7(c), 84 Stat. 89, expressly amended the FCLAA to provide that "[n]othing in this Act shall be construed to affirm or deny the [FTC's] holding that it has the authority to issue trade regulation rules" for tobacco. See also H. R. Conf. Rep. No. 91–897, p. 7 (1970) (statement of House Managers) (we have "no intention to resolve the question as to whether" the FTC could regulate tobacco in a different way); see also 116 Cong. Rec. 7921 (1970) (statement of Rep. Satterfield) (same). Why would one read the FCLAA's pre-emption clause—a provision that Congress intended to limit even in respect to the agency directly at issue—so broadly that it would bar a different agency from engaging in any other cigarette regulation at all? The answer is that the Court need not, and should not, do so. And, inasmuch as the Court already has declined to view the FCLAA as pre-empting the entire field of tobacco regulation, I cannot accept that that same law bars the FDA's regulatory efforts here.

When the FCLAA's narrow pre-emption provision is set aside, the majority's conclusion that Congress clearly intended for its tobacco-related statutes to be the exclusive "response" to "the problem of tobacco and health," *ante*, at 157, is based on legislative silence. Notwithstanding the views voiced by various legislators, Congress itself has addressed expressly the issue of the FDA's tobacco-related authority only once—and, as I have said, its statement was that the statute was *not* to "be construed to affect the question of whether the [FDA] has any authority to regulate any tobacco product." Note following 21 U. S. C. § 321 (1994 ed., Supp. III). The proper inference to be drawn from *all* of the post-1965 statutes, then, is one that interprets Congress' general legislative silence consistently with this statement.

## IV

I now turn to the final historical fact that the majority views as a factor in its interpretation of the subsequent legislative history: the FDA's former denials of its tobacco-related authority.

Until the early 1990's, the FDA expressly maintained that the 1938 statute did not give it the power that it now seeks to assert. It then changed its mind. The majority agrees with me that the FDA's change of positions does not make a significant legal difference. See *ante*, at 156–157; see also *Chevron*, 467 U. S., at 863 ("An initial agency interpretation is not instantly carved in stone"); accord, *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996) ("[C]hange is not invalidating"). Nevertheless, it labels those denials "important context" for drawing an inference about Congress' intent. *Ante*, at 157. In my view, the FDA's change of policy, like the subsequent statutes themselves, does nothing to advance the majority's position.

When it denied jurisdiction to regulate cigarettes, the FDA consistently stated *why* that was so. In 1963, for example, FDA administrators wrote that cigarettes did not satisfy the relevant FDCA definitions—in particular, the "intent" requirement—because cigarette makers did not sell their product with accompanying "therapeutic claims."

Letter to Directors of Bureaus, Divisions and Directors of Districts from FDA Bureau of Enforcement (May 24, 1963), in Public Health Cigarette Amendments of 1971: Hearings on S. 1454 before the Consumer Subcommittee of the Senate Committee on Commerce, 92d Cong., 2d Sess., 240 (1972) (hereinafter FDA Enforcement Letter). And subsequent FDA Commissioners made roughly the same assertion. One pointed to the fact that the manufacturers only "recommended" cigarettes "for smoking pleasure." Two others reiterated the evidentiary need for "health claims." Yet another stressed the importance of proving "intent," adding that "[w]e have not had sufficient evidence" of "intent with regard to nicotine." See, respectively, *id.*, at 239 (Comm'r Edwards); Letter of Dec. 5, 1977, App. 47 (Comm'r Kennedy); 1965 Hearings 193 (Comm'r Rankin); 1994 Hearings 28 (Comm'r Kessler). Tobacco company counsel also testified that the FDA lacked jurisdiction because jurisdiction "depends on . . . intended use," which in turn "depends, *in general,* on the claims and representations made by the manufacturer." Health Consequences of Smoking: Nicotine Addiction, Hearing before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, 100th Cong., 2d Sess., 288 (1988) (testimony of Richard Cooper) (emphasis added).

Other agency statements occasionally referred to additional problems. Commissioner Kessler, for example, said that the "enormous social consequences" flowing from a decision to regulate tobacco counseled in favor of obtaining specific congressional "guidance." 1994 Hearings 69; see also *ante,* at 153 (quoting statement of Health and Human Services Secretary Brandt to the effect that Congress wanted to make the relevant jurisdictional decision). But a fair reading of the FDA's denials suggests that the overwhelming problem was one of proving the requisite manufacturer intent. See *Action on Smoking and Health* v. *Harris,* 655 F. 2d 236, 238–239 (CADC 1980) (FDA "comments" reveal its "understanding" that "the crux of FDA jurisdiction over drugs lay in manufacturers' representations as revelatory of their intent").

What changed? For one thing, the FDA obtained evidence sufficient to prove the necessary "intent" despite the absence of specific "claims." See *supra,* at 172–174. This evidence, which first became available in the early 1990's, permitted the agency to demonstrate that the tobacco companies *knew* nicotine achieved appetite-suppressing, mood-stabilizing, and habituating effects through chemical (not psychological) means, even at a time when the companies were publicly denying such knowledge.

Moreover, scientific evidence of adverse health effects mounted, until, in the late 1980's, a consensus on the seriousness of the matter became firm. That is not to say that concern about smoking's adverse health effects is a new phenomenon. See, *e. g.,* Higginson, A New Counterblast, in Out-door Papers 179, 194 (1863) (characterizing tobacco as " 'a narcotic poison of the most active class' "). It is to say, however, that convincing epidemiological evidence began to appear mid-20th century; that the first Surgeon General's Report documenting the adverse health effects appeared in 1964; and that the Surgeon General's Report establishing nicotine's addictive effects appeared in 1988. At each stage, the health conclusions were the subject of controversy, diminishing somewhat over time, until recently—and only recently—has it become clear that there is a wide consensus about the health problem. See 61 Fed. Reg. 44701–44706 (1996).

Finally, administration policy changed. Earlier administrations may have hesitated to assert jurisdiction for the reasons prior Commissioners expressed. See *supra,* at 186–187 and this page. Commissioners of the current administration simply took a different regulatory attitude.

Nothing in the law prevents the FDA from changing its policy for such reasons. By the mid-1990's, the evidence needed to prove objective intent—even without an express claim—had been found. The emerging scientific consensus about tobacco's adverse, chemically induced, health effects may have convinced the agency that it should spend its resources on this important regulatory effort. As for the change of administrations, I agree with then-JUSTICE REHNQUIST's statement in a different case, where he wrote:

> "The agency's changed view . . . seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 59 (1983) (concurring in part and dissenting in part).

## V

One might nonetheless claim that, even if my interpretation of the FDCA and later statutes gets the words right, it lacks a sense of their "music." See *Helvering* v. *Gregory*, 69 F. 2d 809, 810–811 (CA2 1934) (L. Hand, J.) ("[T]he meaning of a [statute] may be more than that of the separate words, as a melody is more than the notes . . ."). Such a claim might rest on either of two grounds.

First, one might claim that, despite the FDA's legal right to change its mind, its original statements played a critical part in the enactment of the later statutes and now should play a critical part in their interpretation. But the FDA's traditional view was largely premised on a perceived inability to prove the necessary statutory "intent" requirement. See, *e. g.*, FDA Enforcement Letter 240 ("The statutory basis for the exclusion of tobacco products from FDA's jurisdiction is the fact that tobacco marketed for chewing or smoking without accompanying therapeutic claims, does not meet the definitions . . . for food, drug, device or cosmetic"). The statement, "we cannot assert jurisdiction over substance X unless it is treated as a food," would not bar jurisdiction if the agency later establishes that substance X is, and is intended to be, eaten. The FDA's denials of tobacco-related authority sufficiently resemble this kind of statement that they should not make the critical interpretive difference.

Second, one might claim that courts, when interpreting statutes, should assume in close cases that a decision with "enormous social consequences," 1994 Hearings 69, should be made by democratically elected Members of Congress rather than by unelected agency administrators. Cf. *Kent* v. *Dulles*, 357 U. S. 116, 129 (1958) (assuming Congress did not want to delegate the power to make rules interfering with exercise of basic human liberties). If there is such a background canon of interpretation, however, I do not believe it controls the outcome here.

Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable. Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude—one that is important, conspicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.

* * *

According to the FDA, only 2.5% of smokers successfully stop smoking each year, even though 70% say they want to quit and 34% actually make an attempt to do so. See 61 Fed. Reg. 44704 (1996) (citing Centers for Disease Control and Prevention, Cigarette Smoking Among Adults—United States, 1993; 43 Morbidity and Mortality Weekly Report 929 (Dec. 23, 1994)). The fact that only a handful of those who try to quit smoking actually succeed illustrates a certain reality—the reality that the nicotine in cigarettes creates a powerful physiological addiction flowing from chemically induced changes in the brain. The FDA has found that the makers of cigarettes "intend" these physical effects. Hence, nicotine is a "drug"; the cigarette that delivers nicotine to the body is a "device"; and the FDCA's language, read in light of its basic purpose, permits the FDA to assert the disease-preventing jurisdiction that the agency now claims.

The majority finds that cigarettes are so dangerous that the FDCA would require them to be banned (a result the majority believes Congress would not have desired); thus, it concludes that the FDA has no tobacco-related authority. I disagree that the statute would require a cigarette ban. But even if I am wrong about the ban, the statute would restrict only the agency's choice of remedies, not its jurisdiction.

The majority also believes that subsequently enacted statutes deprive the FDA of jurisdiction. But the later laws say next to nothing about the FDA's tobacco-related authority. Previous FDA disclaimers of jurisdiction may have helped to form the legislative atmosphere out of which Congress' own tobacco-specific statutes emerged. But a legislative atmosphere is not a law, unless it is embodied in a statutory word or phrase. And the relevant words and phrases here reveal nothing more than an intent not to change the jurisdictional status quo.

The upshot is that the Court today holds that a regulatory statute aimed at unsafe drugs and devices does not authorize regulation of a drug (nicotine) and a device (a cigarette) that the Court itself finds unsafe. Far more than most, this particular drug and device risks the life-threatening harms that administrative regulation seeks to rectify. The majority's conclusion is counterintuitive. And, for the reasons set forth, I believe that the law does not require it.

Consequently, I dissent.

# CORTEZ BYRD CHIPS, INC. *v.* BILL HARBERT CONSTRUCTION CO., A DIVISION OF BILL HARBERT INTERNATIONAL, INC.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98–1960. Argued January 10, 2000—Decided March 21, 2000

Petitioner Cortez Byrd Chips, Inc., and respondent Bill Harbert Construction Company agreed, *inter alia,* that any disputes arising from Harbert's construction of a Mississippi mill for Cortez Byrd would be decided by arbitration. When such a dispute arose, arbitration was conducted in Alabama and Harbert received an award. Cortez Byrd sought to vacate or modify the award in the Federal District Court for the Southern District of Mississippi, where the contract was performed; and seven days later Harbert sought to confirm the award in the Northern District of Alabama. The latter court refused to dismiss, transfer, or stay its action, concluding that venue was proper only there, and it entered judgment for Harbert. The Eleventh Circuit held that, under the Federal Arbitration Act (FAA), venue for motions to confirm, vacate, or modify awards was exclusively in the district where the arbitration award was made, and thus venue here was limited to the Alabama court.

*Held:* The FAA's venue provisions are permissive, allowing a motion to confirm, vacate, or modify to be brought either in the district where the award was made or in any district proper under the general venue statute. Pp. 197–204.

(a) Cortez Byrd's Mississippi motion was clearly proper as a diversity action under the general venue statute, 28 U. S. C. § 1391(a)(2), because it was filed where the contract was performed. However, the FAA provides that upon motion of an arbitration party, the federal district court where the arbitration award was made "may" vacate, 9 U. S. C. § 10, or "may" modify or correct, § 11, the award. If these provisions are restrictive, supplanting rather than supplementing the general venue statute, there was no Mississippi venue for Cortez Byrd's action. Owing to their contemporaneous enactment and similar language, §§ 10 and 11 are best analyzed together with § 9, which permits parties to select the venue for confirmation of an award and provides that, in the absence of an agreement, venue lies in the federal court for the district where the award was made. Pp. 197–198.

(b) Parsing the language of §§ 9–11 does not answer the question whether the provisions are restrictive or permissive, for there is language supporting both views. However, the history and function of the provisions confirm that they were meant to expand, not limit, venue choice. The FAA was enacted in 1925 against the backdrop of a considerably more restrictive general venue statute than today's. The 1925 general venue statute effectively limited civil suits to the district where the defendant resided, and courts did not favor forum selection clauses. The FAA's venue provisions had an obviously liberalizing effect, undiminished by any suggestion that Congress meant simultaneously to foreclose a suit where the defendant resided. That is normally a defendant's most convenient forum, and it would take a very powerful reason ever to suggest that Congress meant to eliminate such a venue for postarbitration disputes. This view is confirmed by the obviously liberalizing § 9, which permits forum selection agreements. Were §§ 10 and 11 construed restrictively, a proceeding to confirm an award begun in a selected forum would be held in abeyance while an objecting party returned to the district of arbitration to modify or vacate the award. Were that action unsuccessful, the parties would then return to the previously selected forum for the confirming order originally sought. Nothing could be more clearly at odds with the FAA's policy of rapid and unobstructed enforcement of arbitration agreements or with the desired flexibility of parties in choosing an arbitration site. A restrictive interpretation would also place § 3—which permits a court to stay a proceeding referable to arbitration pending such arbitration—and §§ 9–11 in needless tension, for a court with the power to stay an action under § 3 also has the power to confirm any ensuing arbitration award, *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 275–276. Harbert's interpretation would also create anomalous results in the aftermath of arbitrations held abroad. Against this reasoning, specific to the FAA's history and function, Harbert's citations to cases construing other special venue provisions as restrictive, see, *e. g., Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227–228, are beside the point. Their authority is not that special venue statutes are restrictive, but that analysis of special venue provisions must be specific to the statute in question. Pp. 198–204.

169 F. 3d 693, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

*Daniel H. Bromberg* argued the cause for petitioner. With him on the briefs were *John L. Maxey II* and *John F. Hawkins.*

*Susan S. Wagner* argued the cause for respondent. With her on the brief was *Edward P. Meyerson.*

JUSTICE SOUTER delivered the opinion of the Court.

This case raises the issue whether the venue provisions of the Federal Arbitration Act (FAA or Act), 9 U. S. C. §§ 9–11, are restrictive, allowing a motion to confirm, vacate, or modify an arbitration award to be brought only in the district in which the award was made, or are permissive, permitting such a motion either where the award was made or in any district proper under the general venue statute. We hold the FAA provisions permissive.

## I

Petitioner Cortez Byrd Chips, Inc., and respondent Bill Harbert Construction Company agreed that Harbert would build a wood chip mill for Cortez Byrd in Brookhaven, Mississippi. One of the terms was that "[a]ll claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise." App. 52. The agreement went on to provide that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgement may be entered upon it in accordance with applicable law in any court having jurisdiction thereof," *ibid.;* that the agreement to arbitrate "shall be specifically enforceable under applicable law in any court having jurisdiction thereof," *ibid.;* and that the law of the place where the project was located, Mississippi, governed, *id.,* at 60; 169 F. 3d 693, 694 (CA11 1999).

After a dispute arose, Harbert invoked the agreement by a filing with the Atlanta office of the American Arbitration Association, which conducted arbitration in November 1997 in Birmingham, Alabama. The next month, the arbitration panel issued an award in favor of Harbert. *Ibid.*

In January 1998, Cortez Byrd filed a complaint in the United States District Court for the Southern District of Mississippi seeking to vacate or modify the arbitration award, which Harbert then sought to confirm by filing this action seven days later in the Northern District of Alabama. When Cortez Byrd moved to dismiss, transfer, or stay the Alabama action, the Alabama District Court denied the motion, concluding that venue was proper only in the Northern District of Alabama, and entering judgment for Harbert for $274,256.90 plus interest and costs. *Ibid.*

The Court of Appeals for the Eleventh Circuit affirmed. It held itself bound by pre-1981 Fifth Circuit precedent, cf. *Bonner* v. *Prichard,* 661 F. 2d 1206, 1209 (CA11 1981), to the effect that under the Act's venue provisions, 9 U. S. C. §§9–11, venue for motions to confirm, vacate, or modify awards was exclusively in the district in which the arbitration award was made. 169 F. 3d, at 694; *Naples* v. *Prepakt Concrete Co.*, 490 F. 2d 182, 184 (CA5), cert. denied, 419 U. S. 843 (1974). The arbitration here having been held in Birmingham, the rule as so construed limited venue to the Northern District of Alabama.

We granted certiorari, 527 U. S. 1062 (1999), to resolve a split among the Courts of Appeals over the permissive or mandatory character of the FAA's venue provisions. Compare *In re VMS Securities Litigation,* 21 F. 3d 139, 144–145 (CA7 1994) (§§9 and 10 permissive); *Smiga* v. *Dean Witter Reynolds, Inc.*, 766 F. 2d 698, 706 (CA2 1985), cert. denied, 475 U. S. 1067 (1986) (§9 permissive); *Sutter Corp.* v. *P & P Indus., Inc.*, 125 F. 3d 914, 918–920 (CA5 1997) (§§9 and 10 permissive); *P & P Indus., Inc.* v. *Sutter Corp.*, 179 F. 3d 861, 869–870 (CA10 1999) (§§9 and 10 permissive); *Apex Plumbing Supply, Inc.* v. *U. S. Supply Co.*, 142 F. 3d 188, 192 (CA4 1998) (§9 permissive); *Nordin* v. *Nutri/System, Inc.*, 897 F. 2d 339, 344 (CA8 1990) (§9 permissive), with *Central*

*Valley Typographical Union No. 46* v. *McClatchy Newspapers,* 762 F. 2d 741, 744 (CA9 1985) (§ 10 mandatory); *Island Creek Coal Sales Co.* v. *Gainesville,* 729 F. 2d 1046, 1049–1050 (CA6 1984) (§ 9 mandatory); *Sunshine Beauty Supplies, Inc.* v. *United States District Court, Central Dist. of Cal.,* 872 F. 2d 310, 312 (CA9 1989) (§§ 9 and 10 mandatory); *United States ex rel. Chicago Bridge & Iron Co.* v. *Ets-Hokin Corp.,* 397 F. 2d 935, 939 (CA9 1968) (§ 10 mandatory). We reverse.

## II

Section 9 of the FAA governs venue for the confirmation of arbitration awards:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." 9 U. S. C. § 9.

Section 10(a), governing motions to vacate arbitration awards, provides that

> "the United States court in and for the district wherein the [arbitration] award was made may make an order vacating the award upon the application of any party to the arbitration [in any of five enumerated situations]."

And under § 11, on modification or correction,

> "the United States court in and for the district wherein the award was made may make an order modifying or

> correcting the award upon the application of any party to the arbitration."

The precise issue raised in the District Court was whether venue for Cortez Byrd's motion under §§ 10 and 11 was properly laid in the southern district of Mississippi, within which the contract was performed. It was clearly proper under the general venue statute, which provides, among other things, for venue in a diversity action in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U. S. C. § 1391(a)(2). If §§ 10 and 11 are permissive and thus supplement, but do not supplant, the general provision, Cortez Byrd's motion to vacate or modify was properly filed in Mississippi, and under principles of deference to the court of first filing, the Alabama court should have considered staying its hand. Cf. *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 185 (1952); *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1360 (1990). But if §§ 10 and 11 are restrictive, there was no Mississippi venue for Cortez Byrd's action, and the Northern District of Alabama correctly proceeded with the litigation to confirm. Although § 9 is not directly implicated in this action, since venue for Harbert's motion to confirm was proper in the northern district of Alabama under either a restrictive or a permissive reading of § 9, the three venue sections of the FAA are best analyzed together, owing to their contemporaneous enactment and the similarity of their pertinent language.

Enlightenment will not come merely from parsing the language, which is less clear than either party contends. Although "may" could be read as permissive in each section, as Cortez Byrd argues, the mere use of "may" is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority. *United States* v. *Rodgers*, 461 U. S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion[, but] [t]his common-sense principle of statutory construction . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute" (footnote and citations omitted)); *Citizens & Southern Nat. Bank* v. *Bougas,* 434 U. S. 35, 38 (1977). Certainly the warning flag is up in this instance. While Cortez Byrd points to clearly mandatory language in other parts of the Act as some indication that "may" was used in a permissive sense, cf. 9 U. S. C. §§2, 12, Harbert calls attention to a contrary clue in even more obviously permissive language elsewhere in the Act. See §4 ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28 . . ."[1]). Each party has a point, but neither point is conclusive. The answer is not to be had from comparing phrases.

Statutory history provides a better lesson, though, which is confirmed by following out the practical consequences of Harbert's position. When the FAA was enacted in 1925, it appeared against the backdrop of a considerably more restrictive general venue statute than the one current today. At the time, the practical effect of 28 U. S. C. §112(a) was that a civil suit could usually be brought only in the district in which the defendant resided. See 28 U. S. C. §112(a) (1926 ed.).[2] The statute's restrictive application was all the more pronounced due to the courts' general inhospitality to forum selection clauses, see *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 9–10 (1972). Hence, even if an arbitration agreement expressly permitted action to be brought in the district in which arbitration had been conducted, the agreement would probably prove to be vain. The enactment of the special venue provisions in the FAA thus had an obviously liberalizing effect, undiminished by any suggestion, textual or otherwise, that Congress meant simultaneously to foreclose a suit where the defendant resided. Such a consequence would have been as inexplicable in 1925 as it would be passing strange 75 years later. The most convenient forum for a defendant is normally the forum of residence, and it would take a very powerful reason ever to suggest that Congress would have meant to eliminate that venue for postarbitration disputes.

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[1] The original version of §4 referred to "the judicial code at law," rather than Title 28. See United States Arbitration Act, 43 Stat. 883.

[2] "[E]xcept as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 28 U. S. C. §112(a) (1926 ed.). The provision allowing suits in a diversity action in the district in which the plaintiff resided was of limited effect,

The virtue of the liberalizing nonrestrictive view of the provisions for venue in the district of arbitration is confirmed by another obviously liberalizing venue provision of the Act, which in § 9 authorizes a binding agreement selecting a forum for confirming an arbitration award. Since any forum selection agreement must coexist with §§ 10 and 11, one needs to ask how they would work together if §§ 10 and 11 meant that an order vacating or modifying an arbitration award could be obtained only in the district where the award was made. The consequence would be that a proceeding to confirm the award begun in a forum previously selected by agreement of the parties (but outside the district of the arbitration) would need to be held in abeyance if the responding party objected. The objecting party would then have to return to the district of the arbitration to begin a separate

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as restrictive views of personal jurisdiction meant that it was often difficult to sue a defendant outside the district of his residence. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945) (requiring that a defendant have minimum contacts with a forum to be subject to its judgment).

proceeding to modify or vacate the arbitration award, and if the award withstood attack, the parties would move back to the previously selected forum for the confirming order originally sought. Harbert, naturally, is far from endorsing anything of the sort and contends that a court with venue to confirm under a § 9 forum selection clause would also have venue under a later filed motion under § 10. But the contention boils down to denying the logic of Harbert's own position. The regime we have described would follow from adopting that position, and the Congress simply cannot be tagged with such a taste for the bizarre.

Nothing, indeed, would be more clearly at odds with both the FAA's "statutory policy of rapid and unobstructed enforcement of arbitration agreements," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 23 (1983), or with the desired flexibility of parties in choosing a site for arbitration. Although the location of the arbitration may well be the residence of one of the parties, or have some other connection to a contract at issue, in many cases the site will have no relation whatsoever to the parties or the dispute. The parties may be willing to arbitrate in an inconvenient forum, say, for the convenience of the arbitrators, or to get a panel with special knowledge or experience, or as part of some compromise, but they might well be less willing to pick such a location if any future court proceedings had to be held there. Flexibility to make such practical choices, then, could well be inhibited by a venue rule mandating the same inconvenient venue if someone later sought to vacate or modify the award.

A restrictive interpretation would also place § 3 and §§ 9–11 of the FAA in needless tension, which could be resolved only by disrupting existing precedent of this Court. Section 3 provides that any court in which an action "referable to arbitration under an agreement in writing" is pending "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U. S. C. § 3. If an arbitration were then held outside the district of that litigation, under a restrictive reading of §§ 9–11 a subsequent proceeding to confirm, modify, or set aside the arbitration award could not be brought in the district of the original litigation (unless that also happened to be the chosen venue in a forum selection agreement). We have, however, previously held that the court with the power to stay the action under § 3 has the further power to confirm any ensuing arbitration award. *Marine Transit Corp.* v. *Dreyfus,* 284 U. S. 263, 275–276 (1932) ("We do not conceive it to be open to question that, where the court has authority under the statute . . . to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect"). Harbert in effect concedes this point, acknowledging that "the court entering a stay order under § 3 retains jurisdiction over the proceeding and does not 'lose venue.'" Brief for Respondent 29. But that concession saving our precedent still fails to explain why Congress would have wanted to allow venue liberally where motions to confirm, vacate, or modify were brought as subsequent stages of actions antedating the arbitration, but would have wanted a different rule when arbitration was not preceded by a suit between the parties.

Finally, Harbert's interpretation would create anomalous results in the aftermath of arbitrations held abroad. Sections 204, 207, and 302 of the FAA together provide for liberal choice of venue for actions to confirm awards subject to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1975 Inter-American Convention on International Commercial Arbitration.[3] 9

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[3] Section 204 provides for venue in actions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards "in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy . . . could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration." Section 207 states that "any party

U. S. C. §§204, 207, 302. But reading §§9–11 to restrict venue to the site of the arbitration would preclude any action under the FAA in courts of the United States to confirm, modify, or vacate awards rendered in foreign arbitrations not covered by either convention. Cf. 4 I. MacNeil, R. Speidel, & T. Stipanowich, Federal Arbitration Law §44.9.1.8 (1995) (discussing difficulties in enforcing foreign arbitrations held in nonsignatory states). Although such actions would not necessarily be barred for lack of jurisdiction, they would be defeated by restrictions on venue, and anomalies like that are to be avoided when they can be. True, "[t]here have been, and perhaps there still are, occasional gaps in the venue laws, [but] Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U. S. 706, 710, n. 8 (1972); cf. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 516–517 (1974) (noting that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," and that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages").

Attention to practical consequences thus points away from the restrictive reading of §§9–11 and confirms the view that the liberalizing effect of the provisions in the day of their enactment was meant to endure through treating them as

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to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award." Section 302 applies these provisions to actions brought under the Inter-American Convention. Sections 204 and 207 were added to the FAA in 1970; §302 was added in 1990.

permitting, not limiting, venue choice today. As against this reasoning, specific to the history and function of a statute addressing venue where arbitration is concerned, Harbert's citations of cases construing other special venue provisions are beside the point. We found, for example, that Congress had a restrictive intent as to venue in patent cases, see *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227–228 (1957); *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561, 565–566 (1942), a restrictive intent for the sake of protecting national banks when dealing with venue for litigation against them, see *Citizens & Southern Nat. Bank* v. *Bougas*, 434 U. S., at 44, and a restrictive intent as to the geographic reach of Title VII, as evidenced by the lack of extraterritorial venue and other enforcement mechanisms in the statute, see *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256 (1991). But the authority of these cases is not that special venue statutes are deemed to be restrictive; they simply show that analysis of special venue provisions must be specific to the statute. With that we agree in holding the permissive view of FAA venue provisions entitled to prevail.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

# WAL-MART STORES, INC. *v.* SAMARA BROTHERS, INC.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 99–150. Argued January 19, 2000—Decided March 22, 2000

Respondent Samara Brothers, Inc., designs and manufactures a line of children's clothing. Petitioner Wal-Mart Stores, Inc., contracted with a supplier to manufacture outfits based on photographs of Samara garments. After discovering that Wal-Mart and other retailers were selling the so-called knockoffs, Samara brought this action for, *inter alia*, infringement of unregistered trade dress under § 43(a) of the Trademark Act of 1946 (Lanham Act). The jury found for Samara. Wal-Mart then renewed a motion for judgment as a matter of law, claiming that there was insufficient evidence to support a conclusion that Samara's clothing designs could be legally protected as distinctive trade dress for purposes of § 43(a). The District Court denied the motion and awarded Samara relief. The Second Circuit affirmed the denial of the motion.

*Held:* In a § 43(a) action for infringement of unregistered trade dress, a product's design is distinctive, and therefore protectible, only upon a showing of secondary meaning. Pp. 209–216.

(a) In addition to protecting registered trademarks, the Lanham Act, in § 43(a), gives a producer a cause of action for the use by any person of "any . . . symbo[l] or device . . . likely to cause confusion . . . as to the origin . . . of his or her goods." The breadth of the confusion-producing elements actionable under § 43(a) has been held to embrace not just word marks and symbol marks, but also "trade dress"—a category that originally included only the packaging, or "dressing," of a product, but in recent years has been expanded by many Courts of Appeals to encompass the product's design. These courts have correctly assumed that trade dress constitutes a "symbol" or "device" for Lanham Act purposes. Although § 43(a) does not explicitly require a producer to show that its trade dress is distinctive, courts have universally imposed that requirement, since without distinctiveness the trade dress would not "cause confusion . . . as to . . . origin," as § 43(a) requires. In evaluating distinctiveness, courts have differentiated between marks that are inherently distinctive—*i. e.*, marks whose intrinsic nature serves to identify their particular source—and marks that have acquired distinctiveness through secondary meaning—*i. e.*, marks whose primary significance, in the minds of the public, is to identify the product's source rather than the product itself. This Court has held, however, that applications of at least one category of mark—color—can *never* be inherently distinctive, although they can be protected upon a showing of secondary meaning. *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 162–163. Pp. 209–212.

(b) Design, like color, is not inherently distinctive. The attribution of inherent distinctiveness to certain categories of word marks and product packaging derives from the fact that the very purpose of attaching a particular word to a product, or encasing it in a distinctive package, is most often to identify the product's source. Where it is not reasonable to assume consumer predisposition to take an affixed word or packaging as indication of source, inherent distinctiveness will not be found. With product design, as with color, consumers are aware of the reality that, almost invariably, that feature is intended not to identify the source, but to render the product itself more useful or more appealing. Pp. 212–214.

(c) *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, does not foreclose the Court's conclusion, since the trade dress there at issue was restaurant décor, which does not constitute product *design*, but rather product packaging or else some *tertium quid* that is akin to product packaging and has no bearing on the present case. While distinguishing *Two Pesos* might force courts to draw difficult lines between product-design and product-packaging trade dress, the frequency and difficulty of having to distinguish between the two will be much less than the frequency and difficulty of having to decide when a product design is inherently distinctive. To the extent there are close cases, courts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning. Pp. 214–215.

165 F. 3d 120, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

*William D. Coston* argued the cause for petitioner. With him on the briefs were *Kenneth C. Bass III* and *Martin L. Saad*.

*Deputy Solicitor General Wallace* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Acting Assistant Attorney General Ogden*, *Edward C. DuMont*, *Barbara C. Biddle*, *Alfred Mollin*, *Albin F. Drost*, and *Nancy C. Slutter*.

*Stuart M. Riback* argued the cause for respondent. With him on the brief was *Mark I. Levy*.*

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we decide under what circumstances a product's design is distinctive, and therefore protectible, in an action for infringement of unregistered trade dress under § 43(a) of the Trademark Act of 1946 (Lanham Act), 60 Stat. 441, as amended, 15 U. S. C. § 1125(a).

## I

Respondent Samara Brothers, Inc., designs and manufactures children's clothing. Its primary product is a line of spring/summer one-piece seersucker outfits decorated with appliqués of hearts, flowers, fruits, and the like. A number of chain stores, including JCPenney, sell this line of clothing under contract with Samara.

Petitioner Wal-Mart Stores, Inc., is one of the Nation's best known retailers, selling among other things children's clothing. In 1995, Wal-Mart contracted with one of its suppliers, Judy-Philippine, Inc., to manufacture a line of children's outfits for sale in the 1996 spring/summer season. Wal-Mart sent Judy-Philippine photographs of a number of garments from Samara's line, on which Judy-Philippine's garments were to be based; Judy-Philippine duly copied, with

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*Briefs of *amici curiae* urging reversal were filed for the International Mass Retail Association by *Jeffrey S. Sutton* and *Robert J. Verdisco;* for the Private Label Manufacturers Association by *Arthur M. Handler;* and for Scott P. Zimmerman by *Charles W. Calkins.*

*H. Bartow Farr III, Richard G. Taranto,* and *Stephen M. Trattner* filed a brief for Ashley Furniture Industries, Inc., et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Sheldon H. Klein, Michael A. Grow,* and *Louis T. Pirkey;* for the International Trademark Association by *Theodore H. Davis, Jr., Morton D. Goldberg,* and *Marie V. Driscoll;* and for Payless Shoesource, Inc., by *William A. Rudy* and *Robert Kent Sellers.*

only minor modifications, 16 of Samara's garments, many of which contained copyrighted elements. In 1996, Wal-Mart briskly sold the so-called knockoffs, generating more than $1.15 million in gross profits.

In June 1996, a buyer for JCPenney called a representative at Samara to complain that she had seen Samara garments on sale at Wal-Mart for a lower price than JCPenney was allowed to charge under its contract with Samara. The Samara representative told the buyer that Samara did not supply its clothing to Wal-Mart. Their suspicions aroused, however, Samara officials launched an investigation, which disclosed that Wal-Mart and several other major retailers—Kmart, Caldor, Hills, and Goody's—were selling the knockoffs of Samara's outfits produced by Judy-Philippine.

After sending cease-and-desist letters, Samara brought this action in the United States District Court for the Southern District of New York against Wal-Mart, Judy-Philippine, Kmart, Caldor, Hills, and Goody's for copyright infringement under federal law, consumer fraud and unfair competition under New York law, and—most relevant for our purposes—infringement of unregistered trade dress under § 43(a) of the Lanham Act, 15 U. S. C. § 1125(a). All of the defendants except Wal-Mart settled before trial.

After a weeklong trial, the jury found in favor of Samara on all of its claims. Wal-Mart then renewed a motion for judgment as a matter of law, claiming, *inter alia,* that there was insufficient evidence to support a conclusion that Samara's clothing designs could be legally protected as distinctive trade dress for purposes of § 43(a). The District Court denied the motion, 969 F. Supp. 895 (SDNY 1997), and awarded Samara damages, interest, costs, and fees totaling almost $1.6 million, together with injunctive relief, see App. to Pet. for Cert. 56–58. The Second Circuit affirmed the denial of the motion for judgment as a matter of law, 165 F. 3d 120 (1998), and we granted certiorari, 528 U. S. 808 (1999).

## II

The Lanham Act provides for the registration of trademarks, which it defines in § 45 to include "any word, name, symbol, or device, or any combination thereof [used or intended to be used] to identify and distinguish [a producer's] goods . . . from those manufactured or sold by others and to indicate the source of the goods . . . ." 15 U. S. C. § 1127. Registration of a mark under § 2 of the Lanham Act, 15 U. S. C. § 1052, enables the owner to sue an infringer under § 32, 15 U. S. C. § 1114; it also entitles the owner to a presumption that its mark is valid, see § 7(b), 15 U. S. C. § 1057(b), and ordinarily renders the registered mark incontestable after five years of continuous use, see § 15, 15 U. S. C. § 1065. In addition to protecting registered marks, the Lanham Act, in § 43(a), gives a producer a cause of action for the use by any person of "any word, term, name, symbol, or device, or any combination thereof . . . which . . . is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods . . . ." 15 U. S. C. § 1125(a). It is the latter provision that is at issue in this case.

The breadth of the definition of marks registrable under § 2, and of the confusion-producing elements recited as actionable by § 43(a), has been held to embrace not just word marks, such as "Nike," and symbol marks, such as Nike's "swoosh" symbol, but also "trade dress"—a category that originally included only the packaging, or "dressing," of a product, but in recent years has been expanded by many Courts of Appeals to encompass the design of a product. See, *e. g., Ashley Furniture Industries, Inc.* v. *Sangiacomo N. A., Ltd.*, 187 F. 3d 363 (CA4 1999) (bedroom furniture); *Knitwaves, Inc.* v. *Lollytogs, Ltd.*, 71 F. 3d 996 (CA2 1995) (sweaters); *Stuart Hall Co., Inc.* v. *Ampad Corp.*, 51 F. 3d 780 (CA8 1995) (notebooks). These courts have assumed, often without discussion, that trade dress constitutes a "symbol" or "device" for purposes of the relevant sections, and we conclude likewise. "Since human beings might use as a 'symbol' or 'device' almost anything at all that is capable of carrying meaning, this language, read literally, is not restrictive." *Qualitex Co.* v. *Jacobson Products Co.,* 514 U. S. 159, 162 (1995). This reading of § 2 and § 43(a) is buttressed by a recently added subsection of § 43(a), § 43(a)(3), which refers specifically to "civil action[s] for trade dress infringement under this chapter for trade dress not registered on the principal register." 15 U. S. C. § 1125(a)(3) (1994 ed., Supp. V).

The text of § 43(a) provides little guidance as to the circumstances under which unregistered trade dress may be protected. It does require that a producer show that the allegedly infringing feature is not "functional," see § 43 (a)(3), and is likely to cause confusion with the product for which protection is sought, see § 43(a)(1)(A), 15 U. S. C. § 1125(a)(1)(A). Nothing in § 43(a) explicitly requires a producer to show that its trade dress is distinctive, but courts have universally imposed that requirement, since without distinctiveness the trade dress would not "cause confusion . . . as to the origin, sponsorship, or approval of [the] goods," as the section requires. Distinctiveness is, moreover, an explicit prerequisite for registration of trade dress under § 2, and "the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a)." *Two Pesos, Inc.* v. *Taco Cabana, Inc.,* 505 U. S. 763, 768 (1992) (citations omitted).

In evaluating the distinctiveness of a mark under § 2 (and therefore, by analogy, under § 43(a)), courts have held that a mark can be distinctive in one of two ways. First, a mark is inherently distinctive if "[its] intrinsic nature serves to identify a particular source." *Ibid.* In the context of word marks, courts have applied the now-classic test originally formulated by Judge Friendly, in which word marks that are "arbitrary" ("Camel" cigarettes), "fanciful" ("Kodak" film), or "suggestive" ("Tide" laundry detergent) are held to be inherently distinctive. See *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F. 2d 4, 10–11 (CA2 1976). Second, a mark has acquired distinctiveness, even if it is not inherently distinctive, if it has developed secondary meaning, which occurs when, "in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself." *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 851, n. 11 (1982).*

The judicial differentiation between marks that are inherently distinctive and those that have developed secondary meaning has solid foundation in the statute itself. Section 2 requires that registration be granted to any trademark "by which the goods of the applicant may be distinguished from the goods of others"—subject to various limited exceptions. 15 U. S. C. § 1052. It also provides, again with limited exceptions, that "nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce"—that is, which is not inherently distinctive but has become so only through secondary meaning. § 2(f), 15 U. S. C. § 1052(f). Nothing in § 2, however, demands the conclusion that *every* category of mark necessarily includes some marks "by which the goods of the applicant may be distinguished from the goods of others" *without* secondary meaning—that in every category some marks are inherently distinctive.

Indeed, with respect to at least one category of mark—colors—we have held that no mark can ever be inherently distinctive. See *Qualitex, supra,* at 162–163. In *Qualitex,* petitioner manufactured and sold green-gold dry-cleaning press pads. After respondent began selling pads of a similar color, petitioner brought suit under § 43(a), then added a claim under § 32 after obtaining registration for the color of its pads. We held that a color could be protected as a trademark, but only upon a showing of secondary meaning. Reasoning by analogy to the *Abercrombie & Fitch* test developed for word marks, we noted that a product's color is unlike a "fanciful," "arbitrary," or "suggestive" mark, since it does not "almost *automatically* tell a customer that [it] refer[s] to a brand," 514 U. S., at 162–163, and does not "immediately . . . signal a brand or a product 'source,'" *id.*, at 163. However, we noted that, "over time, customers may come to treat a particular color on a product or its packaging . . . as signifying a brand." *Ibid.* Because a color, like a "descriptive" word mark, could eventually "come to indicate a product's origin," we concluded that it could be protected *upon a showing of secondary meaning. Ibid.*

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*The phrase "secondary meaning" originally arose in the context of word marks, where it served to distinguish the source-identifying meaning from the ordinary, or "primary," meaning of the word. "Secondary meaning" has since come to refer to the acquired, source-identifying meaning of a nonword mark as well. It is often a misnomer in that context, since nonword marks ordinarily have no "primary" meaning. Clarity might well be served by using the term "acquired meaning" in both the word-mark and the nonword-mark contexts—but in this opinion we follow what has become the conventional terminology.

It seems to us that design, like color, is not inherently distinctive. The attribution of inherent distinctiveness to certain categories of word marks and product packaging derives from the fact that the very purpose of attaching a particular word to a product, or encasing it in a distinctive packaging, is most often to identify the source of the product. Although the words and packaging can serve subsidiary functions—a suggestive word mark (such as "Tide" for laundry detergent), for instance, may invoke positive connotations in the consumer's mind, and a garish form of packaging (such as Tide's squat, brightly decorated plastic bottles for its liquid laundry detergent) may attract an otherwise indifferent consumer's attention on a crowded store shelf—their predominant function remains source identification. Consumers are therefore predisposed to regard those symbols as indication of the producer, which is why such symbols "almost *automatically* tell a customer that they refer to a brand," *id.*, at 162–163, and "immediately . . . signal a brand or a product 'source,'" *id.*, at 163. And where it is not reasonable to assume consumer predisposition to take an affixed word or packaging as indication of source—where, for example, the affixed word is descriptive of the product ("Tasty" bread) or of a geographic origin ("Georgia" peaches)—inherent distinctiveness will not be found. That is why the statute generally excludes, from those word marks that can be registered as inherently distinctive, words that are "merely descriptive" of the goods, § 2(e)(1), 15 U. S. C. § 1052(e)(1), or "primarily geographically descriptive of them," see § 2(e)(2), 15 U. S. C. § 1052(e)(2). In the case of product design, as in the case of color, we think consumer predisposition to equate the feature with the source does not exist. Consumers are aware of the reality that, almost invariably, even the most unusual of product designs—such as a cocktail shaker shaped like a penguin—is intended not to identify the source, but to render the product itself more useful or more appealing.

The fact that product design almost invariably serves purposes other than source identification not only renders inherent distinctiveness problematic; it also renders application of an inherent-distinctiveness principle more harmful to other consumer interests. Consumers should not be deprived of the benefits of competition with regard to the utilitarian and esthetic purposes that product design ordinarily serves by a rule of law that facilitates plausible threats of suit against new entrants based upon alleged inherent distinctiveness. How easy it is to mount a plausible suit depends, of course, upon the clarity of the test for inherent distinctiveness, and where product design is concerned we have little confidence that a reasonably clear test can be devised. Respondent and the United States as *amicus curiae* urge us to adopt for product design relevant portions of the test formulated by the Court of Customs and Patent Appeals for product packaging in *Seabrook Foods, Inc.* v. *Bar-Well Foods, Ltd.*, 568 F. 2d 1342 (1977). That opinion, in determining the inherent distinctiveness of a product's packaging, considered, among other things, "whether it was a 'common' basic shape or design, whether it was unique or unusual in a particular field, [and] whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods." *Id.*, at 1344 (footnotes omitted). Such a test would rarely provide the basis for summary disposition of an anticompetitive strike suit. Indeed, at oral argument, counsel for the United States quite understandably would not give a definitive answer as to whether the test was met in this very case, saying only that "[t]his is a very difficult case for that purpose." Tr. of Oral Arg. 19.

It is true, of course, that the person seeking to exclude new entrants would have to establish the nonfunctionality of the design feature, see § 43(a)(3), 15 U. S. C. § 1125(a)(3) (1994 ed., Supp. V)—a showing that may involve consideration of its esthetic appeal, see *Qualitex, supra,* at 170. Competition is deterred, however, not merely by successful suit but by the plausible threat of successful suit, and given the unlikelihood of inherently source-identifying design, the game of allowing suit based upon alleged inherent distinctiveness seems to us not worth the candle. That is especially so since the producer can ordinarily obtain protection for a design that *is* inherently source identifying (if any such exists), but that does not yet have secondary meaning, by securing a design patent or a copyright for the design—as, indeed, respondent did for certain elements of the designs in this case. The availability of these other protections greatly reduces any harm to the producer that might ensue from our conclusion that a product design cannot be protected under § 43(a) without a showing of secondary meaning.

Respondent contends that our decision in *Two Pesos* forecloses a conclusion that product-design trade dress can never be inherently distinctive. In that case, we held that the trade dress of a chain of Mexican restaurants, which the plaintiff described as "a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals," 505 U. S., at 765 (internal quotation marks and citation omitted), could be protected under § 43(a) without a showing of secondary meaning, see *id.*, at 776. *Two Pesos* unquestionably establishes the legal principle that trade dress can be inherently distinctive, see, *e. g.*, *id.*, at 773, but it does not establish that *product-design* trade dress can be. *Two Pesos* is inapposite to our holding here because the trade dress at issue, the décor of a restaurant, seems to us not to constitute product *design*. It was either product packaging—which, as we have discussed, normally *is* taken by the consumer to indicate origin—or else some *tertium quid* that is akin to product packaging and has no bearing on the present case.

Respondent replies that this manner of distinguishing *Two Pesos* will force courts to draw difficult lines between product-design and product-packaging trade dress. There will indeed be some hard cases at the margin: a classic glass Coca-Cola bottle, for instance, may constitute packaging for those consumers who drink the Coke and then discard the bottle, but may constitute the product itself for those consumers who are bottle collectors, or part of the product itself for those consumers who buy Coke in the classic glass bottle, rather than a can, because they think it more stylish to drink from the former. We believe, however, that the frequency and the difficulty of having to distinguish between product design and product packaging will be much less than the frequency and the difficulty of having to decide when a product design is inherently distinctive. To the extent there are close cases, we believe that courts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning. The very closeness will suggest the existence of relatively small utility in adopting an inherent-distinctiveness principle, and relatively great consumer benefit in requiring a demonstration of secondary meaning.

* * *

We hold that, in an action for infringement of unregistered trade dress under § 43(a) of the Lanham Act, a product's design is distinctive, and therefore protectible, only upon a showing of secondary meaning. The judgment of the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

# BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM *v.* SOUTHWORTH ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 98–1189. Argued November 9, 1999—Decided March 22, 2000

Petitioner, Board of Regents of the University of Wisconsin System (hereinafter University), requires students at the University's Madison campus to pay a segregated activity fee. The fee supports various campus services and extracurricular student activities. In the University's view, such fees enhance students' educational experience by promoting extracurricular activities, stimulating advocacy and debate on diverse points of view, enabling participation in campus administrative activity, and providing opportunities to develop social skills, all consistent with the University's broad educational mission. Registered student organizations (RSO's) engaging in a number of diverse expressive activities are eligible to receive a portion of the fees, which are administered by the student government subject to the University's approval. The parties have stipulated that the process for reviewing and approving RSO applications for funding is administered in a viewpoint-neutral fashion. RSO's may also obtain funding through a student referendum. Respondents, present and former Madison campus students, filed suit against the University, alleging, *inter alia,* that the fee violates their First Amendment rights, and that the University must grant them the choice not to fund RSO's that engage in political and ideological expression offensive to their personal beliefs. In granting respondents summary judgment, the Federal District Court declared the fee program invalid under *Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209, and *Keller* v. *State Bar of Cal.,* 496 U. S. 1, and enjoined the University from using the fees to fund any RSO engaging in political or ideological speech. Agreeing with the District Court that this Court's compelled speech precedents control, the Seventh Circuit concluded that the program was not germane to the University's mission, did not further a vital University policy, and imposed too great a burden on respondents' free speech rights. It added that protecting those rights was of heightened concern following *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819, because if the University could not discriminate in distributing the funds, students could not be compelled to fund organizations engaging in political and ideological speech. It extended the District Court's order and enjoined the University from requiring students to pay that portion of the fee used to fund RSO's engaged in political or ideological expression.

*Held:*

1. The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech, provided that the program is viewpoint neutral. The University exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. Objecting students, however, may insist upon certain safeguards with respect to the expressive activities they are required to support. The Court's public forum cases are instructive here by close analogy. Because the complaining students must pay fees to subsidize speech they find objectionable, even offensive, the rights acknowledged in *Abood* and *Keller* are implicated. In those cases, this Court held that a required service fee paid by nonunion employees to a union, *Abood, supra,* at 213, and fees paid by lawyers who were required to join a state bar association, *Keller, supra,* at 13–14, could be used to fund speech germane to those organizations' purposes but not to fund the organizations' own political expression. While these precedents identify the protesting students' interests, their germane speech standard is unworkable in the context of student speech at a university and gives insufficient protection both to the objecting students and to the University program itself. Even in the union context, this Court has encountered difficulties in deciding what is germane and what is not. The standard becomes all the more unmanageable in the public university setting, particularly where, as here, the State undertakes to stimulate the whole universe of speech and ideas. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. The vast extent of permitted expression also underscores the high potential for intrusion on the objecting students' First Amendment rights, for it is all but inevitable that the fees will subsidize speech that some students find objectionable or offensive. A university is free to protect those rights by allowing an optional or refund system, but such a system is not a constitutional requirement. If a university determines that its mission is well served if students have the means to engage in dynamic discussion on a broad range of issues, it may impose a mandatory fee to sustain such dialogue. It must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, is the requirement of viewpoint neutrality in the allocation of funding support. This obligation was given substance in *Rosenberger* v. *Rector and Visitors of Univ. of Va., supra,* which concerned a student's right to use an extracurricular speech program already in place. The instant case considers the antecedent question whether a public university may require stu-

dents to pay a fee which creates the mechanism for the extracurricular speech in the first instance. The University may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle. There is symmetry then in the holding here and in *Rosenberger.* Pp. 229–234.

2. Because the parties have stipulated that the University's program respects the principle of viewpoint neutrality, the program in its basic structure must be found consistent with the First Amendment. This decision makes no distinction between campus and off-campus activities; and it ought not be taken to imply that when the University, its agents, employees, or faculty speak, they are subject to the First Amendment analysis which controls in this case. Pp. 234–235.

3. While not well developed on the present record, the referendum aspect of the University's program appears to permit RSO funding or defunding by majority vote of the student body. To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. Pp. 235–236.

151 F. 3d 717, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, THOMAS, and GINSBURG, JJ., joined. SOUTER, J., filed an opinion concurring in the judgment, in which STEVENS and BREYER, JJ., joined, *post,* p. 236.

*Susan K. Ullman,* Assistant Attorney General of Wisconsin, argued the cause for petitioner. With her on the briefs were *James E. Doyle,* Attorney General, and *Peter C. Anderson,* Assistant Attorney General.

*Jordan W. Lorence* argued the cause for respondents. With him on the brief was *Daniel Kelly.**

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Preeta D. Bansal,* Solicitor General, *Peter H. Schiff,* Deputy Solicitor General, *Laura Etlinger,* Assistant Attorney General, and *Mark B. Rotenberg,* and by the Attorneys General for their respective States as follows: *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *Thurbert E. Baker* of Georgia, *Thomas R. Keller* of Hawaii, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Joseph P. Mazurek* of Montana, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, and *Paul G. Summers* of Tennessee; for the State of Oregon by *Hardy*

JUSTICE KENNEDY delivered the opinion of the Court.

For the second time in recent years we consider constitutional questions arising from a program designed to facilitate

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*Myers*, Attorney General, *David Schuman*, Deputy Attorney General, and *Michael D. Reynolds*, Solicitor General; for the American Civil Liberties Union et al. by *Jon G. Furlow, Steven R. Shapiro, Elliot M. Mincberg*, and *Judith E. Schaeffer;* for the American Council on Education et al. by *Stephen S. Dunham, Leonard M. Niehoff*, and *Sheldon E. Steinbach;* for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, James B. Coppess*, and *Laurence Gold;* for the Brennan Center for Justice at New York University School of Law by *Scott D. Makar, Robert Bergen, Michael J. Frevola*, and *Burt Neuborne;* for the Lesbian, Gay, Bisexual, and Transgender Campus Center at UW-Madison et al. by *Patricia M. Logue* and *Ruth E. Harlow;* for the National Legal Aid Defenders Association, Student Legal Services Section, by *Ned R. Jaeckle* and *Kathleen A. Cushing;* for the National Education Association by *Robert H. Chanin, Andrew D. Roth*, and *Michael D. Simpson;* for the New York Public Interest Research Group by *Alexander R. Sussman;* for the Student Press Law Center et al. by *Lucy A. Dalglish;* for Student Rights Law Center, Inc., by *Mitchel D. Grotch;* for the United States Student Association et al. by *David C. Vladeck* and *Alan B. Morrison;* for United Council of University of Wisconsin Students, Inc., by *Mark B. Hazelbaker;* for the University of California Student Association by *Michael S. Sorgen* and *Amy R. Levine;* and for the Wisconsin Student Public Interest Research Group et al. by *Daniel H. Squire, Craig Goldblatt*, and *Francisco Medina.*

Briefs of *amici curiae* urging affirmance were filed for the Atlantic Legal Foundation by *Martin S. Kaufman* and *Edwin L. Lewis III;* for the American Center for Law and Justice by *Jay Alan Sekulow, Mark Nathan Troobnick*, and *James Matthew Henderson, Sr.;* for the Christian Legal Society by *Steven T. McFarland, Samuel B. Casey*, and *Thomas C. Berg;* for the Family Research Institute by *Roy H. Nelson;* for Liberty Counsel by *Mathew D. Staver;* for the National Legal Foundation by *Barry C. Hodge;* for the National Right to Work Legal Defense Foundation, Inc., by *Raymond J. LaJeunesse, Jr.;* for the National Smokers Alliance by *Renee Giachino;* for the Pacific Legal Foundation et al. by *Deborah J. La Fetra;* and for the Washington Legal Foundation et al. by *Daniel E. Troy, Daniel J. Popeo*, and *Paul D. Kamenar.*

Briefs of *amici curiae* were filed for Americans United for Separation of Church and State et al. by *Steven K. Green, Steven M. Freeman*, and *Ayesha N. Khan;* for First Freedoms Foundation by *Michael D. Dean;* for extracurricular student speech at a public university. Respondents are a group of students at the University of Wisconsin (hereinafter University). They brought a First Amendment challenge to a mandatory student activity fee imposed by petitioner Board of Regents of the University of Wisconsin System and used in part by the University to support student organizations engaging in political or ideological speech. Respondents object to the speech and expression of some of the student organizations. Relying upon our precedents which protect members of unions and bar associations from being required to pay fees used for speech the members find objectionable, both the District Court and the Court of Appeals invalidated the University's student fee program. The University contends that its mandatory student activity fee and the speech which it supports are appropriate to further its educational mission.

We reverse. The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral. We do not sustain, however, the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle. As to that aspect of the program, we remand for further proceedings.

## I

The University of Wisconsin is a public corporation of the State of Wisconsin. See Wis. Stat. § 36.07(1) (1993–1994). State law defines the University's mission in broad terms: "to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities . . . and a sense of purpose."

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the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden;* and for Owen Brennan Rounds et al. by *Thomas H. Nelson.*

§ 36.01(2). Some 30,000 undergraduate students and 10,000 graduate and professional students attend the University's Madison campus, ranking it among the Nation's largest institutions of higher learning. Students come to the renowned University from all 50 States and from 72 foreign countries. Last year marked its 150th anniversary; and to celebrate its distinguished history, the University sponsored a series of research initiatives, campus forums and workshops, historical exhibits, and public lectures, all reaffirming its commitment to explore the universe of knowledge and ideas.

The responsibility for governing the University of Wisconsin System is vested by law with the board of regents. § 36.09(1). The same law empowers the students to share in aspects of the University's governance. One of those functions is to administer the student activities fee program. By statute the "[s]tudents in consultation with the chancellor and subject to the final confirmation of the board [of regents] shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities." § 36.09(5). The students do so, in large measure, through their student government, called the Associated Students of Madison (ASM), and various ASM subcommittees. The program the University maintains to support the extracurricular activities undertaken by many of its student organizations is the subject of the present controversy.

It seems that since its founding the University has required full-time students enrolled at its Madison campus to pay a nonrefundable activity fee. App. 154. For the 1995–1996 academic year, when this suit was commenced, the activity fee amounted to $331.50 per year. The fee is segregated from the University's tuition charge. Once collected, the activity fees are deposited by the University into the accounts of the State of Wisconsin. *Id.*, at 9. The fees are drawn upon by the University to support various campus services and extracurricular student activities. In the University's view, the activity fees "enhance the educational experience" of its students by "promot[ing] extracurricular activities," "stimulating advocacy and debate on diverse points of view," enabling "participa[tion] in political activity," "promot[ing] student participa[tion] in campus administrative activity," and providing "opportunities to develop social skills," all consistent with the University's mission. *Id.*, at 154–155.

The board of regents classifies the segregated fee into allocable and nonallocable portions. The nonallocable portion approximates 80% of the total fee and covers expenses such as student health services, intramural sports, debt service, and the upkeep and operations of the student union facilities. *Id.*, at 13. Respondents did not challenge the purposes to which the University commits the nonallocable portion of the segregated fee. *Id.*, at 37.

The allocable portion of the fee supports extracurricular endeavors pursued by the University's registered student organizations or RSO's. To qualify for RSO status students must organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus. *Id.*, at 15. During the 1995–1996 school year, 623 groups had RSO status on the Madison campus. *Id.*, at 255. To name but a few, RSO's included the Future Financial Gurus of America; the International Socialist Organization; the College Democrats; the College Republicans; and the American Civil Liberties Union Campus Chapter. As one would expect, the expressive activities undertaken by RSO's are diverse in range and content, from displaying posters and circulating newsletters throughout the campus, to hosting campus debates and guest speakers, and to what can best be described as political lobbying.

RSO's may obtain a portion of the allocable fees in one of three ways. Most do so by seeking funding from the Student Government Activity Fund (SGAF), administered by the ASM. SGAF moneys may be issued to support an RSO's operations and events, as well as travel expenses "central to the purpose of the organization." *Id.*, at 18. As an alternative, an RSO can apply for funding from the General Student Services Fund (GSSF), administered through the ASM's finance committee. During the 1995–1996 academic year, 15 RSO's received GSSF funding. These RSO's included a campus tutoring center, the student radio station, a student environmental group, a gay and bisexual student center, a community legal office, an AIDS support network, a campus women's center, and the Wisconsin Student Public Interest Research Group (WISPIRG). *Id.*, at 16–17. The University acknowledges that, in addition to providing campus services (*e. g.*, tutoring and counseling), the GSSF-funded RSO's engage in political and ideological expression. Brief for Petitioner 10.

The GSSF, as well as the SGAF, consists of moneys originating in the allocable portion of the mandatory fee. The parties have stipulated that, with respect to SGAF and GSSF funding, "[t]he process for reviewing and approving allocations for funding is administered in a viewpoint-neutral fashion," *id.*, at 14–15, and that the University does not use the fee program for "advocating a particular point of view." *Id.*, at 39.

A student referendum provides a third means for an RSO to obtain funding. *Id.*, at 16. While the record is sparse on this feature of the University's program, the parties inform us that the student body can vote either to approve or to disapprove an assessment for a particular RSO. One referendum resulted in an allocation of $45,000 to WISPIRG during the 1995–1996 academic year. At oral argument, counsel for the University acknowledged that a referendum could also operate to defund an RSO or to veto a funding decision of the ASM. In October 1996, for example, the student body voted to terminate funding to a national student organization to which the University belonged. *Id.*, at 215. Both parties confirmed at oral argument that their stipulation regarding the program's viewpoint neutrality does not extend to the referendum process. Tr. of Oral Arg. 19, 29.

With respect to GSSF and SGAF funding, the ASM or its finance committee makes initial funding decisions. App. 14–15. The ASM does so in an open session, and interested students may attend meetings when RSO funding is discussed. *Id.*, at 14. It also appears that the ASM must approve the results of a student referendum. Approval appears *pro forma*, however, as counsel for the University advised us that the student government "voluntarily views th[e] referendum as binding." Tr. of Oral Arg. 15. Once the ASM approves an RSO's funding application, it forwards its decision to the chancellor and to the board of regents for their review and approval. App. 18, 19. Approximately 30% of the University's RSO's received funding during the 1995–1996 academic year.

RSO's, as a general rule, do not receive lump-sum cash distributions. Rather, RSO's obtain funding support on a reimbursement basis by submitting receipts or invoices to the University. Guidelines identify expenses appropriate for reimbursement. Permitted expenditures include, in the main, costs for printing, postage, office supplies, and use of University facilities and equipment. Materials printed with student fees must contain a disclaimer that the views expressed are not those of the ASM. The University also reimburses RSO's for fees arising from membership in "other related and non-profit organizations." *Id.*, at 251.

The University's policy establishes purposes for which fees may not be expended. RSO's may not receive reimbursement for "[g]ifts, donations, and contributions," the costs of legal services, or for "[a]ctivities which are politically partisan or religious in nature." *Id.*, at 251–252. (The policy does not give examples of the prohibited expenditures.) A separate policy statement on GSSF funding states that an RSO can receive funding if it "does not have a *primarily* political orientation (i. e. is not a registered political group)." *Id.*, at 238. The same policy adds that an RSO "shall not use [student fees] for any lobbying purposes." *Ibid.* At one point in their brief respondents suggest that the prohibition against expenditures for "politically partisan" purposes renders the program not viewpoint neutral. Brief for Respondents 31. In view of the fact that both parties entered a stipulation to the contrary at the outset of this litigation, which was again reiterated during oral argument in this Court, we do not consider respondents' challenge to this aspect of the University's program.

The University's Student Organization Handbook has guidelines for regulating the conduct and activities of RSO's. In addition to obligating RSO's to adhere to the fee program's rules and regulations, the guidelines establish procedures authorizing any student to complain to the University that an RSO is in noncompliance. An extensive investigative process is in place to evaluate and remedy violations. The University's policy includes a range of sanctions for noncompliance, including probation, suspension, or termination of RSO status.

One RSO that appears to operate in a manner distinct from others is WISPIRG. For reasons not clear from the record, WISPIRG receives lump-sum cash distributions from the University. University counsel informed us that this distribution reduced the GSSF portion of the fee pool. Tr. of Oral Arg. 15. The full extent of the uses to which WISPIRG puts its funds is unclear. We do know, however, that WISPIRG sponsored on-campus events regarding homelessness and environmental and consumer protection issues. App. 348. It coordinated community food drives and educational programs and spent a portion of its activity fees for the lobbying efforts of its parent organization and for student internships aimed at influencing legislation. *Id.*, at 344, 347.

In March 1996, respondents, each of whom attended or still attend the University's Madison campus, filed suit in the

United States District Court for the Western District of Wisconsin against members of the board of regents. Respondents alleged, *inter alia*, that imposition of the segregated fee violated their rights of free speech, free association, and free exercise under the First Amendment. They contended the University must grant them the choice not to fund those RSO's that engage in political and ideological expression offensive to their personal beliefs. Respondents requested both injunctive and declaratory relief. On cross-motions for summary judgment, the District Court ruled in their favor, declaring the University's segregated fee program invalid under *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), and *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990). The District Court decided the fee program compelled students "to support political and ideological activity with which they disagree" in violation of respondents' First Amendment rights to freedom of speech and association. App. to Pet. for Cert. 98a. The court did not reach respondents' free exercise claim. The District Court's order enjoined the board of regents from using segregated fees to fund any RSO engaging in political or ideological speech.

The United States Court of Appeals for the Seventh Circuit affirmed in part, reversed in part, and vacated in part. *Southworth* v. *Grebe*, 151 F. 3d 717 (1998). As the District Court had done, the Court of Appeals found our compelled speech precedents controlling. After examining the University's fee program under the three-part test outlined in *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507 (1991), it concluded that the program was not germane to the University's mission, did not further a vital policy of the University, and imposed too much of a burden on respondents' free speech rights. "[L]ike the objecting union members in *Abood*," the Court of Appeals reasoned, the students here have a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with their own personal beliefs. 151 F. 3d, at 731. It added that protecting the objecting students' free speech rights was "of heightened concern" following our decision in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), because "[i]f the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities—that is the only way to protect the individual's rights." 151 F. 3d, at 730, n. 11. The Court of Appeals extended the District Court's order and enjoined the board of regents from requiring objecting students to pay that portion of the fee used to fund RSO's engaged in political or ideological expression. *Id.*, at 735.

Three members of the Court of Appeals dissented from the denial of the University's motion for rehearing en banc. In their view, the panel opinion overlooked the "crucial difference between a requirement to pay money to an organization that explicitly aims to subsidize one viewpoint to the exclusion of other viewpoints, as in *Abood* and *Keller*, and a requirement to pay a fee to a group that creates a viewpoint-neutral forum, as is true of the student activity fee here." *Southworth* v. *Grebe*, 157 F. 3d 1124, 1129 (CA7 1998) (D. Wood, J., dissenting).

Other courts addressing First Amendment challenges to similar student fee programs have reached conflicting results. Compare *Rounds* v. *Oregon State Bd. of Higher Ed.*, 166 F. 3d 1032, 1038–1040 (CA9 1999); *Hays County Guardian* v. *Supple*, 969 F. 2d 111, 123 (CA5 1992), cert. denied, 506 U. S. 1087 (1993); *Kania* v. *Fordham*, 702 F. 2d 475, 480 (CA4 1983); *Good* v. *Associated Students of Univ. of Wash.*, 86 Wash. 2d 94, 105, 542 P. 2d 762, 769 (1975) (en banc), with *Smith* v. *Regents of Univ. of Cal.*, 4 Cal. 4th 843, 862–863, 844 P. 2d 500, 513–514, cert. denied, 510 U. S. 863 (1993). These conflicts, together with the importance of the issue presented, led us to grant certiorari. 526 U. S. 1038 (1999). We reverse the judgment of the Court of Appeals.

## II

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. See, *e. g., Rust* v. *Sullivan,* 500 U. S. 173 (1991); *Regan* v. *Taxation With Representation of Wash.,* 461 U. S. 540, 548–549 (1983). The case we decide here, however, does not raise the issue of the government's right, or, to be more specific, the state-controlled University's right, to use its own funds to advance a particular message. The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself. If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.

The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. We conclude the objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support. Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech. See, *e. g., Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Widmar* v. *Vincent*, 454 U. S. 263 (1981). The standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling. We decide that the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students. The student referendum aspect of the program for funding speech and expressive activities, however, appears to be inconsistent with the viewpoint neutrality requirement.

We must begin by recognizing that the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even offensive. The *Abood* and *Keller* cases, then, provide the beginning point for our analysis. *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990). While those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.

In *Abood*, some nonunion public school teachers challenged an agreement requiring them, as a condition of their employment, to pay a service fee equal in amount to union dues. 431 U. S., at 211–212. The objecting teachers alleged that the union's use of their fees to engage in political speech violated their freedom of association guaranteed by the First and Fourteenth Amendments. *Id.*, at 213. The Court agreed and held that any objecting teacher could "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.*, at 234. The principles outlined in *Abood* provided the foundation for our later decision in *Keller.* There we held that lawyers admitted to practice in California could be required to join a state bar association and to fund activities "germane" to the association's mission of "regulating the legal profession and improving the quality of legal services." 496 U. S., at 13–14. The lawyers could not, however, be required to fund the bar association's own political expression. *Id.*, at 16.

The proposition that students who attend the University cannot be required to pay subsidies for the speech of other students without some First Amendment protection follows from the *Abood* and *Keller* cases. Students enroll in public universities to seek fulfillment of their personal aspirations and of their own potential. If the University conditions the opportunity to receive a college education, an opportunity comparable in importance to joining a labor union or bar association, on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged in *Abood* and *Keller* become implicated. It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her. Yet recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech.

In *Abood* and *Keller*, the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association. The standard of germane speech as applied to student speech at a university is unworkable, however, and gives insufficient protection both to the objecting students and to the University program itself. Even in the context of a labor union, whose functions are, or so we might have thought, well known and understood by the law and the courts after a long history of government regulation and judicial involvement, we have encountered difficulties in deciding what is germane and what is not. The difficulty manifested itself in our decision in *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507 (1991), where different Members of the Court reached varying conclusions regarding what expressive activity was or was not germane to the mission of the association. If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.

The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.

Just as the vast extent of permitted expression makes the test of germane speech inappropriate for intervention, so too does it underscore the high potential for intrusion on the First Amendment rights of the objecting students. It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs. If the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which he or she will or will not support. If a university decided that its students' First Amendment interests were better protected by some type of optional or refund system it would be free to do so. We decline to impose a system of that sort as a constitutional requirement, however. The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The First Amendment does not require the University to put the program at risk.

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995). There the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. We rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent "any mistaken impression that the student newspapers speak for the University." *Id.*, at 841. While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger:* whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger:* Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

The parties have stipulated that the program the University has developed to stimulate extracurricular student expression respects the principle of viewpoint neutrality. If the stipulation is to continue to control the case, the University's program in its basic structure must be found consistent with the First Amendment.

We make no distinction between campus activities and the off-campus expressive activities of objectionable RSO's. Those activities, respondents tell us, often bear no relationship to the University's reason for imposing the segregated fee in the first instance, to foster vibrant campus debate among students. If the University shares those concerns, it is free to enact viewpoint neutral rules restricting off-campus travel or other expenditures by RSO's, for it may create what is tantamount to a limited public forum if the principles of viewpoint neutrality are respected. Cf. *id.*, at 829–830. We find no principled way, however, to impose upon the University, as a constitutional matter, a requirement to adopt geographic or spatial restrictions as a condition for RSOs' entitlement to reimbursement. Universities possess significant interests in encouraging students to take advantage of the social, civic, cultural, and religious opportunities available in surrounding communities and throughout the country. Universities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse. If the rule of viewpoint neutrality is respected, our holding affords the University latitude to adjust its extracurricular student speech program to accommodate these advances and opportunities.

Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. See *Rust* v. *Sullivan,* 500 U. S. 173 (1991); *Regan* v. *Taxation With Representation of Wash.,* 461 U. S. 540 (1983). The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play.

When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position. In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered. Cf. *Rosenberger, supra,* at 833 (discussing the discretion universities possess in deciding matters relating to their educational mission).

## III

It remains to discuss the referendum aspect of the University's program. While the record is not well developed on the point, it appears that by majority vote of the student body a given RSO may be funded or defunded. It is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process. To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here. A remand is necessary and appropriate to resolve this point; and the case in all events must be reexamined in light of the principles we have discussed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. In this Court, the parties shall bear their own costs.

*It is so ordered.*

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in the judgment.

The majority today validates the University's student activity fee after recognizing a new category of First Amendment interests and a new standard of viewpoint neutrality protection. I agree that the University's scheme is permissible, but do not believe that the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it. See *ante*, at 233–234. Instead, I would hold that the First Amendment interest claimed by the student respondents (hereinafter Southworth) here is simply insufficient to merit protection by anything more than the viewpoint neutrality already accorded by the University, and I would go no further.[1]

The parties have stipulated that the grant scheme is administered on a viewpoint neutral basis, and like the majority I take the case on that assumption. The question before us is thus properly cast not as whether viewpoint neutrality is required, but whether Southworth has a claim to relief from this specific viewpoint neutral scheme.[2] Two sources of law might be considered in answering this question.

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[1] I limit my examination of the case solely to the general disbursement scheme; I agree with the majority that the referendum issue was not adequately addressed in the District Court and the Court of Appeals, see *ante*, at 235 and this page, and I would say nothing more on that subject.

[2] Under its own reasoning, the majority need not reach the question whether viewpoint neutrality is required to decide this case. The University program required viewpoint neutrality, and both parties have stipulated that the funds are disbursed accordingly. Stipulation 12, App. 14–

The first comprises First Amendment and related cases grouped under the umbrella of academic freedom.[3] Such law might be implicated by the University's proffered rationale, that the grant scheme funded by the student activity fee is an integral element in the discharge of its educational mission. App. 253 (excerpt from Dean of Students Office Student Organization Handbook noting that the activities of student groups constitute a "'second curriculum'"); *id.*, at 41, 42–44 (statement of Associate Dean of Students of the UW-Madison noting academic importance of funding scheme); see also *ante*, at 233. Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach. In *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214 (1985), we recognized these related conceptions: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Id.*, at 226, n. 12 (citations omitted). Some of the opinions in our books emphasize broad conceptions of academic freedom that if accepted by the Court might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission. So, in *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957), Justice Frankfurter, concurring in the result and joined by Justice Harlan, explained the

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15. If viewpoint neutrality is a sufficient condition, the majority could uphold the scheme here on that limited ground without deciding whether it is a necessary one.

[3] We have long recognized the constitutional importance of academic freedom. See *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (plurality opinion); *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967).

importance of a university's ability to define its own mission by quoting from a statement on the open universities in South Africa:

> " 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Id.*, at 263 (citations omitted).

These broad statements on academic freedom do not dispose of the case here, however. *Ewing* addressed not the relationship between academic freedom and First Amendment burdens imposed by a university, but a due process challenge to a university's academic decisions, while as to them the case stopped short of recognizing absolute autonomy. *Ewing, supra,* at 226, and n. 12. And Justice Frankfurter's discussion in *Sweezy,* though not rejected, was not adopted by the full Court, *Sweezy, supra,* at 263 (opinion concurring in result). Our other cases on academic freedom thus far have dealt with more limited subjects, and do not compel the conclusion that the objecting university student is without a First Amendment claim here.[4] While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching (as the majority recognizes, *ante*, at 232), we have never held that universities lie entirely beyond the reach of students' First Amendment rights.[5] Thus our prior cases do not go so far as to control the result in this one, and going beyond those cases would be out of order, simply because the University has not litigated on grounds of academic freedom. As to that freedom and university autonomy, then, it is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees. *Sweezy, supra,* at 262–264 (Frankfurter, J., concurring in result); *Ewing, supra,* at 226, n. 12.

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[4] Our university cases have dealt with restrictions imposed from outside the academy on individual teachers' speech or associations, *id.*, at 591–592; *Shelton* v. *Tucker, supra,* at 487; *Sweezy* v. *New Hampshire, supra,* at 236; *Wieman* v. *Updegraff, supra,* at 184–185, and cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, *Hazelwood School Dist.* v. *Kuhlmeier,* 484 U. S. 260, 262 (1988); *Bethel School Dist. No. 403* v. *Fraser,* 478 U. S. 675, 677 (1986); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 504 (1969), whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education.

The second avenue for addressing Southworth's claim to a pro rata refund or the total abolition of the student activity fee is to see how closely the circumstances here resemble instances of governmental speech mandates found to require relief. As a threshold matter, it is plain that this case falls far afield of those involving compelled or controlled speech, apart from subsidy schemes. Indirectly transmitting a fraction of a student activity fee to an organization with an offensive message is in no sense equivalent to restricting or modifying the message a student wishes to express. Cf. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U. S. 557, 572–574 (1995). Nor does it require an individual to bear an offensive statement personally, as in *Wooley* v. *Maynard,* 430 U. S. 705, 707 (1977), let alone to affirm a moral or political commitment, as in *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 626–629 (1943). In each of these cases, the government was imposing far more directly and offensively on an objecting individual than collecting the fee that indirectly funds the jumble of other speakers' messages in this case.

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[5] Indeed, acceptance of the most general statement of academic freedom (as in the South African manifesto quoted by Justice Frankfurter) might be thought even to sanction student speech codes in public universities.

Next, I agree with the majority that the *Abood* and *Keller* line of cases does not control the remedy here, the situation of the students being significantly different from that of union or bar association members. *Ante,* at 230; see *Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.,* 496 U. S. 1 (1990). First, the relationship between the fee payer and the ultimately objectionable expression is far more attenuated. In the union and bar association cases, an individual was required to join or at least drop money in the coffers of the very organization promoting messages subject to objection. *Abood, supra,* at 211–213, 215; *Keller, supra,* at 13–14. The connection between the forced contributor and the ultimate message was as direct as the unmediated contribution to the organization doing the speaking. The student contributor, however, has to fund only a distributing agency having itself no social, political, or ideological character and itself engaging (as all parties agree) in no expression of any distinct message.[6] App. 14–15, 34, 39, 41. Indeed, the disbursements, varying from year to year, are as likely as not to fund an organization that disputes the very message an individual student finds exceptionable. *Id.,* at 39. Thus, the clear connection between fee payer and offensive speech that loomed large in our decisions in the union and bar cases is simply not evident here.

Second, Southworth's objection has less force than it might otherwise carry because the challenged fees support a government program that aims to broaden public discourse. As I noted in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 873–874, and n. 3, 889–891 (1995) (dissenting opinion), the university fee at issue is a tax.[7] The state university compels it; it is paid into state accounts; and it is disbursed under the ultimate authority of the State. Wis. Stat. § 36.09(5) (1993–1994); App. 9, 18–19. Although the facts here may not fit neatly under our holdings on government speech (and the University has expressly renounced any such claim),[8] *ante*, at 229, our cases do suggest that under the First Amendment the government may properly use its tax revenue to promote general discourse.[9] In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, we rejected a challenge to a congressional program providing viewpoint neutral subsidies to all Presidential candidates based in part on this reasoning:

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[6] I have noted in other contexts that the act of funding itself may have a communicative element, see *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819, 892–893, n. 11 (1995) (dissenting opinion); *National Endowment for Arts* v. *Finley,* 524 U. S. 569, 611, n. 6 (1998) (dissenting opinion), but there is no allegation that such general expression is objectionable here, nor is it clear that such a claim necessarily raises substantial First Amendment concerns in light of the speech promoting and educational aspects of this expression. Cf. *Buckley* v. *Valeo,* 424 U. S. 1, 92–93 (1976) *(per curiam).* See also *infra* this page and 241–243.

> "[The program] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the program] furthers, not abridges, pertinent First Amendment values." *Id.*, at 92–93 (footnotes omitted).

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[7] True, one does not have to go to college, but one does not have to own real estate or receive a dividend.

[8] Unlike the majority, I would not hold that the mere fact that the University disclaims speech as its own expression takes it out of the scope of our jurisprudence on government directed speech. We have never generally questioned a university's "spacious discretion" to allocate public funds. See *Rosenberger*, *supra*, at 892 (SOUTER, J., dissenting) (citing *Rust* v. *Sullivan*, 500 U. S. 173 (1991), and *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983)).

[9] Of course, I believe that even a government program that promotes a broad range of expression is subject to the specific prohibition on government funding to promote religion, imposed by the Establishment Clause. See *Rosenberger*, *supra*, at 882 (SOUTER, J., dissenting).

And we have recognized the same principle outside of the sphere of government spending as well. In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), we rejected a shopping mall owner's blanket claim that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Id.*, at 85 (footnote omitted). We then upheld the right of individuals to exercise state-protected rights of expression on a shopping mall owner's property, noting among other things that there was no danger that such a requirement would " 'dampe[n] the vigor and limi[t] the variety of public debate.' " *Id.*, at 87, 88 (quoting *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257 (1974) (alteration in original)). The same consideration goes against the fee payer's speech objection to the scheme here.

Third, our prior compelled speech and compelled funding cases are distinguishable on the basis of the legitimacy of governmental interest. No one disputes the University's assertion that some educational value is derived from the activities supported by the fee, *ante*, at 232–233; *supra*, at 237, whereas there was no governmental interest in mandating union or bar association support beyond supporting the collective bargaining and professional regulatory functions of those organizations, see *Abood*, *supra*, at 223–224; *Keller*, *supra*, at 13–14. Nor was there any legitimate governmental interest in requiring the publication or affirmation of propositions with which the bearer or speaker did not agree.[10] *Wooley*, 430 U. S., at 716–717; *Barnette*, 319 U. S., at 640–642.

Finally, the weakness of Southworth's claim is underscored by its setting within a university, whose students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach. No one disputes that some fraction of students' tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students. Least of all does anyone claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement. See *Rosenberger*, *supra*, at 892–893, and nn. 11–12 (SOUTER, J., dissenting). The University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas. Since uses of tuition payments (not optional for anyone who wishes to stay in college) may fund offensive speech far more obviously than the student activity fee does, it is difficult to see how the activity fee could present a stronger argument for a refund.

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[10] The legitimacy of the governmental objective here distinguishes the case in my view from one brought by a university student who objected to supporting religious evangelism. See *Rosenberger*, *supra*, at 868–871 (SOUTER, J., dissenting).

In sum, I see no basis to provide relief from the scheme being administered, would go no further, and respectfully concur in the judgment.

# GARNER, FORMER CHAIRMAN OF THE STATE BOARD OF PARDONS AND PAROLES OF GEORGIA, ET AL. *v.* JONES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99–137. Argued January 11, 2000—Decided March 28, 2000

Respondent escaped while serving a life sentence for murder, committed another murder, and was sentenced to a second life term. Georgia law requires the State's Board of Pardons and Paroles (Board) to consider inmates serving life sentences for parole after seven years. At the time respondent committed his second offense, the Board's Rule 475–3–.05(2) required that reconsiderations for parole take place every three years. Acting pursuant to statutory authority, the Board subsequently extended the reconsideration period to at least every eight years. The Board has the discretion to shorten that interval, but declined to do so when it applied the amended Rule in respondent's case, citing his multiple offenses and the circumstances and nature of his second offense. Respondent sued petitioner Board members, claiming that retroactive application of the amended Rule violated the *Ex Post Facto* Clause. The District Court denied respondent's motion for discovery and awarded petitioners summary judgment. The Eleventh Circuit reversed. It found that the amended Rule's retroactive application was necessarily an *ex post facto* violation and that the Rule differed in material respects from the change in California parole law sustained in *California Dept. of Corrections* v. *Morales,* 514 U. S. 499. It did not consider the Board's internal policies regarding its implementation of the Rule, finding, among other things, that such policies were unenforceable and easily changed.

*Held:*

1. The Court of Appeals' analysis failed to reveal whether retroactive application of the amendment to Rule 475–3–.05(2) violated the *Ex Post Facto* Clause. The controlling inquiry is whether such application creates a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Morales, supra,* at 509. Here, the question is whether amended Rule 475–3–.05(2) creates a significant risk of prolonging respondent's incarceration. That risk is not inherent in the amended Rule's framework, and it has not otherwise been demonstrated on the record. While *Morales* identified several factors convincing this

Court that California's law created an insignificant risk of increased punishment for covered inmates, the Court was careful not to adopt a single formula for identifying which parole adjustments would survive an *ex post facto* challenge. States must have due flexibility in formulating parole procedure and addressing problems associated with confinement and release. This case turns on the amended Rule's operation within the whole context of Georgia's parole system. Georgia law gives the Board broad discretion in determining whether an inmate should receive early release. Such discretion does not displace the *Ex Post Facto* Clause's protections, but the idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. The statutory structure, its implementing regulations, and the Board's unrefuted representations regarding its operations do not support respondent's conclusion that the Board will not exercise its discretion in the period between parole reviews. The Georgia law is qualified in two important respects. First, it vests the Board with discretion as to how often to set an inmate's date for reconsideration, with an 8-year maximum. Second, the Board's policies permit expedited reviews in the event of a change in circumstance or new information. These qualifications permit the Board to set reconsideration dates according to the likelihood that a review will result in meaningful considerations as to whether an inmate is suitable for release. The Board's policy of providing reconsideration every eight years when it does not expect that parole would be granted during the intervening years enables the Board to ensure that those prisoners who should receive parole come to its attention. Given respondent's criminal history, it is difficult to see how the Board increased his risk of serving a longer time when it set an 8-year, not a 3-year, interval. Yet, even he may seek earlier review upon showing changed circumstances or new information. The Eleventh Circuit's supposition that the Rule seems certain to result in increased incarceration falls short of the rigorous analysis required by the *Morales* standard. When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. On the record in this case, it cannot be concluded that the change in Georgia law lengthened respondent's actual imprisonment time. Pp. 249–256.

2. The Eleventh Circuit erred in not considering the Board's internal policy statement regarding how it intends to enforce its Rule. At a minimum, such statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling

statute and regulations, and therefore whether the amended Rule created a significant risk of increased punishment. Absent a demonstration to the contrary, it is presumed that the Board follows its statutory commands and internal policies. Pp. 256–257.

3. The Eleventh Circuit's analysis failed to reveal whether the amended Rule, in its operation, created a significant risk of increased punishment for respondent. He claims that he has not been permitted sufficient discovery to make this showing. The matter of adequate discovery is one for the Court of Appeals or, as need be, for the District Court in the first instance. P. 257.

164 F. 3d 589, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in part in the judgment, *post*, p. 257. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 260.

*Christopher S. Brasher*, Senior Assistant Attorney General of Georgia, argued the cause for petitioners. With him on the briefs were *Thurbert E. Baker*, Attorney General, *Mary Beth Westmoreland*, Deputy Attorney General, and *Jacqueline F. Bunn*, Assistant Attorney General.

*Elizabeth Thompson Kertscher* argued the cause for respondent. With her on the brief were *William V. Custer* and *LeeAnn Jones*.*

JUSTICE KENNEDY delivered the opinion of the Court.

We granted certiorari to decide whether the retroactive application of a Georgia law permitting the extension of intervals between parole considerations violates the *Ex Post Facto* Clause. The Court of Appeals found that retroactive application of the change in the law was necessarily an *ex post facto* violation. In disagreement with that determination, we reverse its judgment and remand for further proceedings.

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**Jill A. Pryor*, *Steven R. Shapiro*, and *Gerald Weber* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

## I

In 1974 respondent Robert L. Jones began serving a life sentence after his conviction for murder in the State of Georgia. He escaped from prison some five years later and, after being a fugitive for over two years, committed another murder. He was apprehended, convicted, and in 1982 sentenced to a second life term.

Under Georgia law, at all times relevant here, the State's Board of Pardons and Paroles (Board or Parole Board) has been required to consider inmates serving life sentences for parole after seven years. Ga. Code Ann. § 42–9–45(b) (1982). The issue in this case concerns the interval between proceedings to reconsider those inmates for parole after its initial denial. At the time respondent committed his second offense, the Board's Rules required reconsiderations to take place every three years. Ga. Rules & Regs., Rule 475–3–.05(2) (1979). In 1985, after respondent had begun serving his second life sentence, the Parole Board, acting under its authority to "set forth . . . the times at which periodic reconsideration [for parole] shall take place," Ga. Code Ann. § 42–9–45(a) (1982), amended its Rules to provide that "[r]econsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years," Ga. Rules & Regs., Rule 475–3–.05(2) (1985).

The Parole Board considered respondent for parole in 1989, seven years after the 1982 conviction. It denied release and, consistent with the 1985 amendment to Rule 475–3–.05(2), reconsideration was set for 1997, eight years later. In 1991, however, the United States Court of Appeals for the Eleventh Circuit held that retroactive application of the amended Rule violated the *Ex Post Facto* Clause. *Akins* v. *Snow*, 922 F. 2d 1558, cert. denied, 501 U. S. 1260 (1991). In compliance with that decision, in effect reinstating its earlier 3-year Rule, the Parole Board reconsidered respondent's case in 1992 and in 1995. Both times parole was denied, the Board citing for its action respondent's "multiple offenses" and the "circumstances and nature of" the second offense. App. 53–54.

In 1995 the Parole Board determined that our decision in *California Dept. of Corrections* v. *Morales,* 514 U. S. 499 (1995), had rejected the rationale underlying the Eleventh Circuit's decision in *Akins.* The Board resumed scheduling parole reconsiderations at least every eight years, and so at respondent's 1995 review it set the next consideration for 2003. Had the Board wished to do so, it could have shortened the interval, but the 8-year period was selected based on respondent's "multiple offenses" and the "circumstances and nature of" his second offense. App. 54. Respondent, acting *pro se,* brought this action under Rev. Stat. § 1979, 42 U. S. C. § 1983, claiming, *inter alia,* the amendment to Rule 475–3–.05(2) violated the *Ex Post Facto* Clause. The suit was filed against individual members of the Parole Board, petitioners in this Court. Respondent requested leave to conduct discovery to support his claim, but the District Court denied the motion and entered summary judgment for petitioners. The court determined the amendment to Rule 475–3–.05(2) "change[d] only the timing between reconsideration hearings" for inmates sentenced to life in prison, thereby "relieving the Board of the necessity of holding parole hearings for prisoners who have no reasonable chance of being released." App. to Pet. for Cert. 27a. Because the Parole Board's policies permit inmates, upon a showing of "a change in their circumstance or where the Board receives new information," App. 56, to receive expedited reconsideration for parole, the court further concluded the amendment created " 'only the most speculative and attenuated possibility' " of increasing a prisoner's measure of punishment, App. to Pet. for Cert. 27a (quoting *Morales, supra,* at 509).

The Court of Appeals reversed, finding the amended Georgia Rule distinguishable in material respects from the California law sustained in *Morales.* 164 F. 3d 589 (CA11 1999). In finding the Georgia law violative of the *Ex Post Facto*

Clause, the court posited that the set of inmates affected by the retroactive change—all prisoners serving life sentences—is "bound to be far more sizeable than the set . . . at issue in *Morales*"—inmates convicted of more than one homicide. *Id.*, at 594. The Georgia law sweeps within its coverage, the court continued, "many inmates who can expect at some point to be paroled," *ibid.*, and thus "seems certain to ensure that some number of inmates will find the length of their incarceration extended in violation of the *Ex Post Facto* Clause of the Constitution," *id.*, at 595. "Eight years is a long time," the court emphasized, and "[m]uch can happen in the course of eight years to affect the determination that an inmate would be suitable for parole." *Ibid.* The Court of Appeals recognized that the Parole Board would set a new parole review date three years or more into the future (up to eight years) only where it concludes that " 'it is not reasonable to expect that parole would be granted' " sooner. *Ibid.* (quoting policy statement of Parole Board). The court thought this policy insufficient, however, because, unlike the statute in *Morales*, it does not require the Board "to make any particularized findings" and is not "carefully tailored." 164 F. 3d, at 594–595. The court also recognized that the Board's policy permitted it to reconsider any parole denials upon a showing of a "change in circumstance[s]" or upon the Board's receipt of "new information." The court deemed the policy insufficient, however, stating that "[p]olicy statements, unlike regulations are unenforceable and easily changed, and adherence to them is a matter of the Board's discretion." *Id.*, at 595.

We granted certiorari, 527 U. S. 1068 (1999), and we now reverse.

## II

The States are prohibited from enacting an *ex post facto* law. U. S. Const., Art. I, § 10, cl. 1. One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission. *Collins* v. *Youngblood,* 497 U. S. 37, 42 (1990) (citing *Beazell* v. *Ohio,* 269 U. S. 167, 169–170 (1925)). Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept. See *Lynce* v. *Mathis,* 519 U. S. 433, 445–446 (1997) (citing *Weaver* v. *Graham,* 450 U. S. 24, 32 (1981)); *Morales,* 514 U. S., at 508–509. Whether retroactive application of a particular change in parole law respects the prohibition on *ex post facto* legislation is often a question of particular difficulty when the discretion vested in a parole board is taken into account.

Our recent decision in *Morales* is an appropriate beginning point. There a California statute changed the frequency of reconsideration for parole from every year to up to every three years for prisoners convicted of more than one homicide. *Id.,* at 503. We found no *ex post facto* violation, emphasizing that not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited. *Id.,* at 508–509. The question is "a matter of 'degree.'" *Id.,* at 509 (quoting *Beazell, supra,* at 171). The controlling inquiry, we determined, was whether retroactive application of the change in California law created "a sufficient risk of increasing the measure of punishment attached to the covered crimes." 514 U. S., at 509.

The amended California law did not violate this standard. It did not modify the statutory punishment imposed for any particular offenses. Nor did the amendment alter the standards for determining either the initial date for parole eligibility or an inmate's suitability for parole. *Id.,* at 507. The amendment did not change the basic structure of California's parole law. It vested the California parole board with discretion to decrease the frequency with which it reconsidered parole for a limited class, consisting of prisoners convicted of more than one homicide. *Id.,* at 507, 510. If the board determined a low likelihood of release existed for a member within that class, it could set the prisoner's next consideration date three years hence. The change in California law did not, however, prohibit requests for earlier reconsideration based on a change of circumstances. *Id.*, at 512–513. Historical practices within the California penal system indicated "about 90% of *all* prisoners are found unsuitable for parole at the initial hearing, while 85% are found unsuitable at the second and subsequent hearings." *Id.*, at 510–511 (citing *In re Jackson*, 39 Cal. 3d 464, 473, 703 P. 2d 100, 105 (1985)). On these facts we determined the *Ex Post Facto* Clause did not prohibit California from conserving and reallocating the resources that would otherwise be expended to conduct annual parole hearings for inmates with little chance of release. 514 U. S., at 511–512. The sum of these factors illustrated that the decrease in the frequency of parole suitability proceedings "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." *Id.*, at 509.

Consistent with the Court of Appeals' analysis, respondent stresses certain differences between Georgia's amended parole law and the California statute reviewed in *Morales*. The amendment to Rule 475–3–.05(2), respondent urges, permits the extension of parole reconsiderations by five years (not just by two years); covers all prisoners serving life sentences (not just multiple murderers); and affords inmates fewer procedural safeguards (in particular, no formal hearings in which counsel can be present). These differences are not dispositive. The question is whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration. See *ibid.* The requisite risk is not inherent in the framework of amended Rule 475–3–.05(2), and it has not otherwise been demonstrated on the record.

Our decision in *Morales* did not suggest all States must model their procedures governing consideration for parole after those of California to avoid offending the *Ex Post Facto* Clause. The analysis undertaken in *Morales* did identify factors which convinced us the amendment to California law created an insignificant risk of increased punishment for covered inmates. Our opinion was careful, however, not to adopt a single formula for identifying which legislative adjustments, in matters bearing on parole, would survive an *ex post facto* challenge. *Ibid.* We also observed that the *Ex Post Facto* Clause should not be employed for "the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures." *Id.*, at 508. These remain important concerns. The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release.

The case turns on the operation of the amendment to Rule 475–3–.05(2) within the whole context of Georgia's parole system. Georgia law charges the Parole Board with determining which prisoners "may be released on pardon or parole and [with] fixing the time and conditions thereof." Ga. Code Ann. § 42–9–20 (1997). In making release decisions, the same law, in relevant part, provides:

> "Good conduct, achievement of a fifth-grade level or higher on standardized reading tests, and efficient performance of duties by an inmate shall be considered by the board in his favor and shall merit consideration of an application for pardon or parole. No inmate shall be placed on parole until and unless the board shall find that there is reasonable probability that, if he is so released, he will live and conduct himself as a respectable and law-abiding person and that his release will be compatible with his own welfare and the welfare of society. Furthermore, no person shall be released on pardon or placed on parole unless and until the board is satisfied that he will be suitably employed in self-sustaining employment or that he will not become a public charge." § 42–9–42(c).

See also § 42–9–43 (listing information the Board should consider, including wardens' reports, results of physical and mental examinations, and reports regarding prisoners' performance in educational programs). These provisions illustrate the broad discretion the Parole Board possesses in determining whether an inmate should receive early release. Accord, *Sultenfuss* v. *Snow,* 35 F. 3d 1494, 1501–1502 (CA11 1994) (en banc) (describing the discretion Georgia law vests with Parole Board). Only upon a showing that the Board engaged in a "gross abuse of discretion" can a prisoner challenge a parole denial in the Georgia courts. *Lewis* v. *Griffin,* 258 Ga. 887, 888, n. 3, 376 S. E. 2d 364, 366, n. 3 (1989).

The presence of discretion does not displace the protections of the *Ex Post Facto* Clause, however. Cf. *Weaver,* 450 U. S., at 30–31. The danger that legislatures might disfavor certain persons after the fact is present even in the parole context, and the Court has stated that the *Ex Post Facto* Clause guards against such abuse. See *Miller* v. *Florida,* 482 U. S. 423, 429 (1987) (citing *Calder* v. *Bull,* 3 Dall. 386, 389 (1798) (Chase, J.)). On the other hand, to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression, see *Weaver, supra,* at 28–29, we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions. See, *e. g., Justice* v. *State Board of Pardons and Paroles,* 234 Ga. 749, 751–752, 218 S. E. 2d 45, 46–47 (1975) (explaining, by illustration to one prisoner's circumstances, that parole decisions rest upon the

Board's consideration of numerous factors specific to an inmate's offense, rehabilitative efforts, and ability to live a responsible, productive life). The essence of respondent's case, as we see it, is not that discretion has been changed in its exercise but that, in the period between parole reviews, it will not be exercised at all. The statutory structure, its implementing regulations, and the Parole Board's unrefuted representations regarding its operations do not lead to this conclusion.

The law changing the frequency of parole reviews is qualified in two important respects. First, the law vests the Parole Board with discretion as to how often to set an inmate's date for reconsideration, with eight years for the maximum. See Ga. Rules & Regs., Rule 475–3–.05(2) (1985) ("Reconsideration . . . shall take place at least every eight years"). Second, the Board's policies permit "expedited parole reviews in the event of a change in their circumstance or where the Board receives new information that would warrant a sooner review." App. 56. These qualifications permit a more careful and accurate exercise of the discretion the Board has had from the outset. Rather than being required to review cases *pro forma,* the Board may set reconsideration dates according to the likelihood that a review will result in meaningful considerations as to whether an inmate is suitable for release. The Board's stated policy is to provide for reconsideration at 8-year intervals "when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years." *Ibid.* The policy enables the Board to put its resources to better use, to ensure that those prisoners who should receive parole come to its attention. By concentrating its efforts on those cases identified as having a good possibility of early release, the Board's Rules might result in the release of some prisoners earlier than would have been the case otherwise.

The particular case of respondent well illustrates that the Board's Rule changes are designed for the better exercise of the discretion it had from the outset. Given respondent's criminal history, including his escape from prison and the commission of a second murder, it is difficult to see how the Board increased the risk of his serving a longer time when it decided that its parole review should be exercised after an 8-year, not a 3-year, interval. Yet if such a risk develops, respondent may, upon a showing of either "a change in [his] circumstance[s]" or the Board's receipt of "new information," seek an earlier review before the 8-year interval runs its course.

We do not accept the Court of Appeals' supposition that Rule 475–3–.05(2) "seems certain" to result in some prisoners serving extended periods of incarceration. 164 F. 3d, at 595. The standard announced in *Morales* requires a more rigorous analysis of the level of risk created by the change in law. Cf. 514 U. S., at 506–507, n. 3 ("After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage' . . . but on whether any such change . . . increases the penalty by which a crime is punishable"). When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. The litigation in *Morales* concerned a statute covering inmates convicted of more than one homicide and proceeded on the assumption that there were no relevant differences between inmates for purposes of discerning whether retroactive application of the amended California law violated the *Ex Post Facto* Clause. In the case before us, respondent must show that as applied to his own sentence the law created a significant risk of increasing his punishment. This remains the issue in the case, though the general operation of the Georgia parole system may produce relevant evidence and inform further analysis on the point.

The record before the Court of Appeals contained little information bearing on the level of risk created by the change in law. Without knowledge of whether retroactive application of the amendment to Rule 475–3–.05(2) increases, to a significant degree, the likelihood or probability of prolonging respondent's incarceration, his claim rests upon speculation.

On the record in this case, we cannot conclude the change in Georgia law lengthened respondent's time of actual imprisonment. Georgia law vests broad discretion with the Board, and our analysis rests upon the premise that the Board exercises its discretion in accordance with its assessment of each inmate's likelihood of release between reconsideration dates. If the assessment later turns out not to hold true for particular inmates, they may invoke the policy the Parole Board has adopted to permit expedited consideration in the event of a change in circumstances. App. 56.

The Court of Appeals erred in not considering the Board's internal policy statement. At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment to Rule 475–3–.05(2) created a significant risk of increased punishment. It is often the case that an agency's policies and practices will indicate the manner in which it is exercising its discretion. Cf. *INS* v. *Yueh-Shaio Yang,* 519 U. S. 26, 32 (1996) (observing that the reasonableness of discretionary agency action can be gauged by reference to the agency's policies and practices). The Court of Appeals was incorrect to say the Board's policies were of no relevance in this case. Absent a demonstration to the contrary, we presume the Board follows its statutory commands and internal policies in fulfilling its obligations. Cf. *United States ex rel. Accardi* v. *Shaugnessy,* 347 U. S. 260, 266–268 (1954). In *Morales,* we relied upon the State's representation that its parole board had a practice of granting inmates' requests for early review. See 514 U. S., at 512–513 (citing Reply Brief for Petitioner, O. T. 1994, No. 93–1462, p. 3, n. 1). The policy statement here, by contrast, is a formal, published statement as to how the Board intends to enforce its Rule. It follows *a fortiori* from *Morales* that the Court of Appeals should not have disregarded the policy. Absent any demonstration to the contrary from respondent, we respect the Board's representation that inmates, upon making a showing of a "change in their circumstance[s]" or upon the Board's receipt of "new information," may request expedited consideration. App. 56.

The Court of Appeals' analysis failed to reveal whether the amendment to Rule 475–3–.05(2), in its operation, created a significant risk of increased punishment for respondent. Respondent claims he has not been permitted sufficient discovery to make this showing. The matter of adequate discovery is one for the Court of Appeals or, as need be, for the District Court in the first instance. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, concurring in part in the judgment.

I would agree with the Court's opinion if we were faced with an amendment to the frequency of parole-eligibility determinations prescribed by the Georgia Legislature. Since I do not believe, however, that a change in frequency prescribed by the Georgia State Board of Pardons and Paroles (Board) would violate the *Ex Post Facto* Clause even if it did pose a sufficient "risk" of decreasing the likelihood of parole, I would reverse the decision of the Eleventh Circuit without the necessity of remand.

The Court treats this case as a mere variation on the *Morales* theme, whereas in reality it contains a critical difference: In *Morales*, the frequency of parole suitability hearings had been fixed by law, and a legislative change had given

California's Board of Prison Terms discretion to decrease the frequency. See *California Dept. of Corrections* v. *Morales,* 514 U. S. 499, 503 (1995); *ante,* at 250. Here, there has been no such change. Today, as at the time of respondent's offense, the Georgia statute requires only that the Board provide for automatic "periodic reconsideration," Ga. Code Ann. § 42–9–45 (1982). The length of the period, like the ultimate question of parole, was and is entrusted to the Board's discretion.

Any sensible application of the *Ex Post Facto* Clause, and any application faithful to its historical meaning, must draw a distinction between the penalty that a person can anticipate for the commission of a particular crime, and opportunities for mercy or clemency that may go to the reduction of the penalty. I know of no precedent for the proposition that a defendant is entitled to the same degree of mercy or clemency that he could have expected at the time he committed his offense. Under the traditional system of minimum-maximum sentences (20 years to life, for example), it would be absurd to argue that a defendant would have an *ex post facto* claim if the compassionate judge who presided over the district where he committed his crime were replaced, prior to the defendant's trial, by a so-called "hanging judge." Discretion to be compassionate or harsh is inherent in the sentencing scheme, and being denied compassion is one of the risks that the offender knowingly assumes.

At the margins, to be sure, it may be difficult to distinguish between justice and mercy. A statutory parole system that reduces a prisoner's sentence by fixed amounts of time for good behavior during incarceration can realistically be viewed as an entitlement—a reduction of the prescribed penalty—rather than a discretionary grant of leniency. But that is immeasurably far removed from the present case. In Georgia parole, like pardon (which is granted or denied by the same Board), is—and was at the time respondent committed his offense—a matter of grace. It may be denied for any reason (except, of course, an unlawful one such as race), or for no reason. And where, as here, the length of the reconsideration period is entrusted *to the discretion of the same body that has discretion over the ultimate parole determination,* any risk engendered by changes to the length of that period is merely part of the uncertainty which was inherent in the discretionary parole system, and to which respondent subjected himself when he committed his crime.

It makes no more sense to freeze in time the Board's discretion as to procedures than it does to freeze in time the Board's discretion as to substance. Just as the *Ex Post Facto* Clause gives respondent no cause to complain that the Board in place at the time of his offense has been replaced by a new, tough-on-crime Board that is much more parsimonious with parole, it gives him no cause to complain that it has been replaced by a new, big-on-efficiency Board that cuts back on reconsiderations without cause. And the change in policy is irrelevant, in my view, whether or not the preexisting policy happens to have been embodied in a policy statement or regulation. To make the constitutional prohibition turn upon that feature would be to ignore reality and to discourage measures that promote fairness and consistency. Such a policy statement or regulation, in the context of a system conferring complete discretion as to substance and as to the timing of hearings upon the Board, simply creates no reasonable expectation of entitlement, except perhaps among prisoners whose parole hearings are held (or are scheduled to be held) while the regulation is in effect. This is not an expectation of the sort that can give rise to *ex post facto* concerns.

In essence, respondent complains that by *exercising* its discretion (as to the frequency of review), the Board has *deprived* him of the exercise of its discretion (as to the question of his release). In my view, these are two sides of the same coin—two aspects of one and the same discretion—and respondent can have no valid grievance.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

I think the Court of Appeals made no error here and so respectfully dissent from the reversal. A change in parole policy violates the *Ex Post Facto* Clause if it creates a "sufficient," *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 509 (1995), or substantial risk that the class affected by the change will serve longer sentences as a result.[1] To determine the likelihood that the change at issue here will lengthen sentences, we need to look at the terms of the new Rule, and then at the possibility that the terms are mitigated by a practice of making exceptions.

Before the board changed its reconsideration Rule, a prisoner would receive a second consideration for parole by year 10, whereas now the second consideration must occur only by year 15; those who would receive a third consideration at year 13 will now have no certain consideration until year 23, and so on. An example of the effect of the longer intervals between mandatory review can be seen by considering the average term served under the old Rule. In 1992, a member of the Georgia Legislature stated that the average life-sentenced inmate served 12 years before parole. See Spotts, Sentence and Punishment: Provide for the Imposition of Life Sentence Without Parole, 10 Ga. St. U. L. Rev. 183, 183, and n. 4 (1993). Some prisoners must have been paroled before 12 years. But those who would have been paroled when considered a second time at year 10 or a third time at year 13 will now be delayed to year 15. While the average helps to show the effects Georgia's new Rule is likely to have on some prisoners who would be released at the early end of the parole spectrum, the changed Rule threatens to increase punishment for all life-sentenced prisoners, not just those who would have been paroled at or before the average time. If a prisoner who would have been paroled on his fourth consideration in year 16 under the old Rule has to wait until his third consideration in year 23 under the new Rule, his punishment has been increased regardless of the average.

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[1] In the first instance, at least, our cases have traditionally evaluated the effect of the change on the class subject to the new rule, rather than focusing solely on the individual challenging the change, *Weaver* v. *Graham*, 450 U. S. 24, 33 (1981). It can be difficult, if not impossible, for one person to prove that a change in penal policy has increased the quantum of punishment beyond what he would previously have received, since a sentencing decision is often a mix of rules and discretion. See *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937). At the same time, when one looks at the affected class it can be quite clear that punishment has increased overall. That is proof enough that the new Rule applied retroactively violates the *Ex Post Facto* Clause and, as an invalid rule, should not be applied to anyone within the class.

Georgia, which controls all of the relevant information, has given us nothing to suggest the contrary. It has given us no basis to isolate any subclass of life prisoners subject to the change who were unlikely to be paroled before some review date at which consideration is guaranteed under the new Rule. On the contrary, the terms of the Rule adopted by the State define the affected class as the entire class of life-sentenced prisoners, and the natural inference is that the Rule affects prisoners throughout the whole class. This is very different from the situation in *Morales*, in which it was shown that 85% of the affected class were found unsuited for parole upon reconsideration. *Morales*, *supra*, at 511. At some point, common sense can lead to an inference of a substantial risk of increased punishment, and it does so here.

The significance of that conclusion is buttressed by statements by the board and its chairman, available at the board's official website, indicating that its policies were intended to increase time served in prison. See Georgia State Board of Pardons and Paroles, News Releases, Policy Mandates 90% Prison Time for Certain Offenses (Jan. 2, 1998), http://www.pap.state.ga.us/pr_98.html ("Since 1991 the Board has steadily and consistently amended and refined its guidelines and policies to provide for lengthier prison service for violent criminals"); Georgia State Board of Pardons and Paroles, Violent-Crime Lifers Who Died in Prison (June 4, 1998), http://www.pap.state.ga.us/pr_98.html (quoting Chairman Walter Ray as stating that "'obtaining parole on a life-sentence is increasingly rare'" and reporting that "[b]ecause of strict sentencing laws as well as the Board's conservative paroling policy, agency officials predict successive fiscal years will reflect a rising number of inmates for whom a life sentence does indeed mean just that").[2] If respondent had ever been allowed to undertake discovery, further statements of punitive intent may well have been forthcoming. Although we have never decided that a purpose to increase punishment, absent a punitive effect, itself invalidates a retroactive policy change, see *Lynce* v. *Mathis*, 519 U. S. 433, 443 (1997), evidence of purpose certainly confirms the inference of substantial risk of longer sentences drawn above. It is, after all, reasonable to expect that members of a parole board acting with a purpose to get tough succeed in doing just that.

On the other side, there is no indication that the board adopted the new policy merely to obviate useless hearings or save administrative resources, the justification the Court accepted in *Morales*. See 514 U. S., at 511. Indeed, since a parole board review in Georgia means that one board member examines an inmate's file without a hearing and makes a decision, and no specific findings are required to deny parole, any interpretation of the rule change as a measure to conserve resources is weak at best, and insufficient to counter the inference of a substantial risk that the prisoners who will get subsequent mandatory parole considerations years after the reviews that the old Rule would have guaranteed will in fact serve longer sentences.[3]

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[2] As Georgia's punitiveness increased, the number of persons on parole decreased. See Georgia State Board of Pardons and Paroles, Georgia's Criminal Justice Population Increased by 9% in 1998; Only Decrease Was in Persons on Parole (Feb. 1, 1999), http://www.pap.state.ga.us/pr_99.html. News releases available in Clerk of Court's case file.

Thus, I believe the Eleventh Circuit properly granted summary judgment for respondent. Although Georgia argues that the board freely makes exceptions to the 8-year Rule in appropriate cases, the State provided no evidence that the board's occasional willingness to reexamine cases sufficiently mitigates the substantial probability of increased punishment. While the majority accepts the argument that, even without evidence of practice, the board's discretion to revisit its assignment of a reconsideration date may be sufficient standing alone to preclude an *ex post facto* challenge, this is surely wrong. The policy statement on which the majority is willing to rely, see App. 56, gives a prisoner no assurance that new information or changed circumstances will matter, even assuming that prisoners are aware (and able to take advantage) of their limited ability to ask the board to change its mind. Because in the end the board's ability to reconsider based on a "change in [a prisoner's] circumstance or where the Board receives new information," *ibid.*, is entirely discretionary, free of all standards, an 8-year period before further consideration of parole made solely upon review of an inmate's file has to create a real risk of longer confinement.

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[3] The majority suggests, *ante*, at 252, that the Court required no particular procedural safeguards in *California Dept. of Corrections* v. *Morales*, even though the Court mentioned those safeguards as an important factor in its conclusion that there was no increase in the quantum of punishment in that case, see 514 U. S., at 511–512. This is true, but it does not address the problem with Georgia's virtually unbounded scheme. Once the risk of increased punishment exists, the board's nearly nonexistent safeguards provide no way of reducing that risk.

Georgia insists that its lack of procedural safeguards is irrelevant to this case, because due process does not require much in the way of procedural safeguards for parole. But that is beside the point. The challenge here is to the retroactive increase in the quantum of punishment. Unlike the California procedure for delaying parole reconsideration in *Morales*, the Georgia procedure here includes no actual hearing for the prisoner whose reconsideration is delayed five extra years, and the board is not required to explain itself. Georgia's procedural minimalism increases the likelihood that prisoners will get rubberstamp treatment, and decreases the likelihood that the exceptions to the policy on which the majority relies will actually be applied in a way that diminishes the significant probability of increased punishment. Cf. *Penson* v. *Ohio*, 488 U. S. 75, 81–82, n. 4 (1988) (stating that a requirement to give written reasons provides an inducement to make careful decisions in cases that might otherwise be summarily ignored); *Smith* v. *Robbins*, 528 U. S. 259, 290–291 (2000) (STEVENS, J., dissenting) (noting that the process of writing out reasons for decision improves the quality of the decision and can reveal error). Parole need not operate under rigidly defined procedures, but if the board decides to make changes retroactive, it must do something to prevent those changes from increasing punishment in violation of the *Ex Post Facto* Clause.

A further word about the absence of record evidence of practice under the new Rule is in order. One reason that there is none is that Georgia resisted discovery. In this Court, it sought to compensate for the absence of favorable evidence by lodging documents recounting parole reconsiderations before the mandatory reconsideration date. But every instance occurred after the Eleventh Circuit had ruled against the State.[4] These examples of reconsiderations are the parole equivalent of fixing the broken front steps after the invited guest has slipped, fallen, and seen a lawyer; they do nothing to show that the board's own interpretation of its policy mitigated the risk of increased punishment.[5]

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[4] Georgia's statistics show only that, in fiscal year 1999, about 20% of inmates received reconsideration dates of three years or less; about 10% got reconsideration dates more than three years but less than eight, and 70% got 8-year dates. See App. to Reply Brief for Petitioners 9. Eighty percent were therefore at least potentially negatively affected by the change from a 3-year to an 8-year delay in reconsideration. Even on their own terms, then, the statistics do not show that board policies mitigate the substantial risk of increased punishment.

[5] Indeed, as the board explains its decisionmaking procedures, "[t]he overriding factor in determining whether or not to parole a person under life sentence is the severity of the offense." Georgia Board of Pardons

I also dissent from the Court's failure to require discovery on remand. At the very least, the record gives reason to expect that discovery could show that the affected class has been subjected to the risk of increased sentences. *Morales* stressed that the question of what changes will be "'of sufficient moment to transgress the constitutional prohibition' *must* be a matter of 'degree,'" 514 U. S., at 509 (citation omitted) (emphasis in original). Even if I am wrong and respondent cannot prevail on this record, it is plain that further discovery is justified to determine the degree to which the change at issue here altered sentence lengths.

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and Paroles, Parole Decisions (visited Mar. 2, 2000), http://www.pap.state.ga.us/Decisions.htm. If we accept the board's statements, changed circumstances or new information would rarely make a difference.

# FLORIDA *v.* J. L.

## CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 98–1993. Argued February 29, 2000—Decided March 28, 2000

After an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun, officers went to the bus stop and saw three black males, one of whom, respondent J. L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm or observe any unusual movements. One of the officers frisked J. L. and seized a gun from his pocket. J. L., who was then almost 16, was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. The trial court granted his motion to suppress the gun as the fruit of an unlawful search. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment.

*Held:* An anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. An officer, for the protection of himself and others, may conduct a carefully limited search for weapons in the outer clothing of persons engaged in unusual conduct where, *inter alia,* the officer reasonably concludes in light of his experience that criminal activity may be afoot and that the persons in question may be armed and presently dangerous. *Terry* v. *Ohio,* 392 U. S. 1, 30. Here, the officers' suspicion that J. L. was carrying a weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller. The tip lacked sufficient indicia of reliability to provide reasonable suspicion to make a *Terry* stop: It provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. See *Alabama* v. *White,* 496 U. S. 325, 327. The contentions of Florida and the United States as *amicus* that the tip was reliable because it accurately described J. L.'s visible attributes misapprehend the reliability needed for a tip to justify a *Terry* stop. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. This Court also declines to adopt the argument that the standard *Terry* analysis should be modified to license a "firearm exception," under which a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. The facts of this case do not require the Court to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great—*e. g.*, a report of a person carrying a bomb—as to justify a search even without a showing of reliability. Pp. 269–274.

727 So. 2d 204, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C. J., joined, *post*, p. 274.

*Michael J. Neimand*, Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs was *Robert A. Butterworth*, Attorney General.

*Irving L. Gornstein* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman, Assistant Attorney General Robinson*, and *Deputy Solicitor General Dreeben.*

*Harvey J. Sepler* argued the cause for respondent. With him on the brief were *Bennett H. Brummer* and *Andrew Stanton.**

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*Briefs of *amici curiae* urging reversal were filed for Americans for Effective Law Enforcement, Inc., et al. by *Wayne W. Schmidt, James P. Manak, Richard Weintraub*, and *Bernard J. Farber;* for the Justice Coalition by *Scott D. Makar;* for the National Association of Police Organizations by *Stephen R. McSpadden;* and for the State of Illinois et al. by *James E. Ryan*, Attorney General of Illinois, *Joel D. Bertocchi*, Solicitor General, *William Browers* and *Michael M. Glick*, Assistant Attorneys General, and *Dan Schweitzer*, joined by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *John M. Bailey* of Connecticut, *M. Jane Brady* of Delaware, *Earl I. Anzai* of Hawaii, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran* of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of

JUSTICE GINSBURG delivered the opinion of the Court.

The question presented in this case is whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person. We hold that it is not.

## I

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. App. to Pet. for Cert. A–40 to A–41. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip—the record does not say how long—two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." *Id.*, at A–42. One of the three, respondent J. L., was wearing a plaid shirt. *Id.*, at A–41. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J. L. made no threatening or otherwise unusual movements. *Id.*, at A–42 to A–44. One of the officers approached J. L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J. L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing.

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Pennsylvania, *Jose A. Fuentes Agostini* of Puerto Rico, *Sheldon Whitehouse* of Rhode Island, *Charles M. Condon* of South Carolina, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Jan Graham* of Utah, *Christine O. Gregoire* of Washington, and *Gay Woodhouse* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the Congress of Racial Equality, Inc., by *Stefan B. Tahmassebi;* for the National Association of Criminal Defense Lawyers et al. by *James J. Tomkovicz* and *Barbara E. Bergman;* for the National Rifle Association of America et al. by *Robert Dowlut* and *David B. Kopel;* and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden.*

J. L., who was at the time of the frisk "10 days shy of his 16th birth[day]," Tr. of Oral Arg. 6, was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment. 727 So. 2d 204 (1998).

Anonymous tips, the Florida Supreme Court stated, are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's "'not easily predicted'" movements. *Id.*, at 207 (quoting *Alabama* v. *White*, 496 U. S. 325, 332 (1990)). The tip leading to the frisk of J. L., the court observed, provided no such predictions, nor did it contain any other qualifying indicia of reliability. 727 So. 2d, at 207–208. Two justices dissented. The safety of the police and the public, they maintained, justifies a "firearm exception" to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips. *Id.*, at 214–215.

Seeking review in this Court, the State of Florida noted that the decision of the State's Supreme Court conflicts with decisions of other courts declaring similar searches compatible with the Fourth Amendment. See, *e. g.*, *United States* v. *DeBerry*, 76 F. 3d 884, 886–887 (CA7 1996); *United States* v. *Clipper*, 973 F. 2d 944, 951 (CADC 1992). We granted certiorari, 528 U. S. 963 (1999), and now affirm the judgment of the Florida Supreme Court.

## II

Our "stop and frisk" decisions begin with *Terry* v. *Ohio*, 392 U. S. 1 (1968). This Court held in *Terry:*

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his

> experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.*, at 30.

In the instant case, the officers' suspicion that J. L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see *Adams* v. *Williams*, 407 U. S. 143, 146–147 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," *Alabama* v. *White*, 496 U. S., at 329. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Id.*, at 327. The question we here confront is whether the tip pointing to J. L. had those indicia of reliability.

In *White*, the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. *Ibid.* Standing alone, the tip would not have justified a *Terry* stop. 496 U. S., at 329. Only after police observation showed that the informant had accurately predicted the woman's movements, we explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine.

*Id.*, at 332. Although the Court held that the suspicion in *White* became reasonable after police surveillance, we regarded the case as borderline. Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband. We accordingly classified *White* as a "close case." *Ibid.*

The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J. L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J. L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. Brief for Petitioner 20–21. The United States as *amicus curiae* makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip . . . ." Brief for United States 16. These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Cf. 4 W. LaFave, Search and Seizure § 9.4(h), p. 213 (3d ed. 1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).

A second major argument advanced by Florida and the United States as *amicus* is, in essence, that the standard *Terry* analysis should be modified to license a "firearm exception." Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry*'s rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. See 392 U. S., at 30. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms.

Several Courts of Appeals have held it *per se* foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well. See, *e. g., United States* v. *Sakyi*, 160 F. 3d 164, 169 (CA4 1998); *United States* v. *Dean*, 59 F. 3d 1479, 1490, n. 20 (CA5 1995); *United States* v. *Odom*, 13 F. 3d 949, 959 (CA6 1994); *United States* v. *Martinez*, 958 F. 2d 217, 219 (CA8 1992). If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams* and *White*, the Fourth Amendment is not so easily satisfied. Cf. *Richards* v. *Wisconsin*, 520 U. S. 385, 393–394 (1997) (rejecting a *per se* exception to the "knock and announce" rule for narcotics cases partly because "the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others," thus allowing the exception to swallow the rule).*

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the

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*At oral argument, petitioner also advanced the position that J. L.'s youth made the stop and frisk valid, because it is a crime in Florida for persons under the age of 21 to carry concealed firearms. See Fla. Stat. § 790.01 (1997) (carrying a concealed weapon without a license is a misdemeanor), § 790.06(2)(b) (only persons aged 21 or older may be licensed to carry concealed weapons). This contention misses the mark. Even assuming that the arresting officers could be sure that J. L. was under 21, they would have had reasonable suspicion that J. L. was engaged in criminal activity only if they could be confident that he was carrying a gun in the first place. The mere fact that a tip, if true, would describe illegal activity does not mean that the police may make a *Terry* stop without meeting the reliability requirement, and the fact that J. L. was under 21 in no way made the gun tip more reliable than if he had been an adult.

indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, see *Florida* v. *Rodriguez,* 469 U. S. 1 (1984) *(per curiam),* and schools, see *New Jersey* v. *T. L. O.,* 469 U. S. 325 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry,* to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in *Adams* and *White* does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

The judgment of the Florida Supreme Court is affirmed.

*It is so ordered.*

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, concurring.

On the record created at the suppression hearing, the Court's decision is correct. The Court says all that is necessary to resolve this case, and I join the opinion in all respects. It might be noted, however, that there are many indicia of reliability respecting anonymous tips that we have yet to explore in our cases.

When a police officer testifies that a suspect aroused the officer's suspicion, and so justifies a stop and frisk, the courts can weigh the officer's credibility and admit evidence seized pursuant to the frisk even if no one, aside from the officer and defendant themselves, was present or observed the seizure. An anonymous telephone tip without more is different, however; for even if the officer's testimony about receipt of the tip is found credible, there is a second layer of inquiry respecting the reliability of the informant that cannot be pursued. If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.

On this record, then, the Court is correct in holding that the telephone tip did not justify the arresting officer's immediate stop and frisk of respondent. There was testimony that an anonymous tip came in by a telephone call and nothing more. The record does not show whether some notation or other documentation of the call was made either by a voice recording or tracing the call to a telephone number. The prosecution recounted just the tip itself and the later verification of the presence of the three young men in the circumstances the Court describes.

It seems appropriate to observe that a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action. One such feature, as the Court recognizes, is that the tip predicts future conduct of the alleged criminal. There may be others. For example, if an unnamed caller with a voice which sounds the same each time tells police on two successive nights about criminal activity which in fact occurs each night, a similar call on the third night ought not be treated automatically like the tip in the case now before us. In the instance supposed, there would be a plausible argument that experience cures some of the uncertainty surrounding the anonymity, justifying a proportionate police response. In today's case, however, the State provides us with no data about the reliability of anonymous tips. Nor do we know whether the dispatcher or arresting officer had any objective reason to believe that this tip had some particular indicia of reliability.

If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. This too seems to be different from the tip in the present case. See *United States* v. *Sierra-Hernandez,* 581 F. 2d 760 (CA9 1978).

Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting to police, squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might, in appropriate cases, be used by police to locate the caller. It is unlawful to make false reports to the police, *e. g.,* Fla. Stat. Ann. § 365.171(16) (Supp. 2000); Fla. Stat. § 817.49 (1994), and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips.

These matters, of course, must await discussion in other cases, where the issues are presented by the record.

# CITY OF ERIE ET AL. *v.* PAP'S A. M., TDBA "KANDYLAND"

## CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 98–1161. Argued November 10, 1999—Decided March 29, 2000

Erie, Pennsylvania, enacted an ordinance making it a summary offense to knowingly or intentionally appear in public in a "state of nudity." Respondent Pap's A. M. (hereinafter Pap's), a Pennsylvania corporation, operated "Kandyland," an Erie establishment featuring totally nude erotic dancing by women. To comply with the ordinance, these dancers had to wear, at a minimum, "pasties" and a "G-string." Pap's filed suit against Erie and city officials, seeking declaratory relief and a permanent injunction against the ordinance's enforcement. The Court of Common Pleas struck down the ordinance as unconstitutional, but the Commonwealth Court reversed. The Pennsylvania Supreme Court in turn reversed, finding that the ordinance's public nudity sections violated Pap's right to freedom of expression as protected by the First and Fourteenth Amendments. The Pennsylvania court held that nude dancing is expressive conduct entitled to some quantum of protection under the First Amendment, a view that the court noted was endorsed by eight Members of this Court in *Barnes* v. *Glen Theatre, Inc.,* 501 U. S. 560. The Pennsylvania court explained that, although one stated purpose of the ordinance was to combat negative secondary effects, there was also an unmentioned purpose to "impact negatively on the erotic message of the dance." Accordingly, the Pennsylvania court concluded that the ordinance was related to the suppression of expression. Because the ordinance was not content neutral, it was subject to strict scrutiny. The court held that the ordinance failed the narrow tailoring requirement of strict scrutiny. After this Court granted certiorari, Pap's filed a motion to dismiss the case as moot, noting that Kandyland no longer operated as a nude dancing club, and that Pap's did not operate such a club at any other location. This Court denied the motion.

*Held:* The judgment is reversed, and the case is remanded.

553 Pa. 348, 719 A. 2d 273, reversed and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I and II, concluding that the case is not moot. A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *County of Los Angeles* v. *Davis,* 440 U. S. 625, 631. Simply closing Kandyland is not sufficient to moot the case because Pap's is still incorporated under Pennsylvania law, and could again decide to operate a nude dancing establishment in Erie. Moreover, Pap's failed, despite its obligation to the Court, to mention the potential mootness issue in its brief in opposition, which was filed after Kandyland was closed and the property sold. See *Board of License Comm'rs of Tiverton* v. *Pastore*, 469 U. S. 238, 240. In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, seeks to have the case declared moot. And it is the defendant city that seeks to invoke the federal judicial power to obtain this Court's review of the decision. Cf. *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 617–618. The city has an ongoing injury because it is barred from enforcing the ordinance's public nudity provisions. If the ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal.* v. *United States*, 506 U. S. 9, 13. And Pap's still has a concrete stake in the case's outcome because, to the extent it has an interest in resuming operations, it has an interest in preserving the judgment below. This Court's interest in preventing litigants from attempting to manipulate its jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness. See, *e. g., United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632. Pp. 287–289.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER, concluded in Parts III and IV that:

1. Government restrictions on public nudity such as Erie's ordinance should be evaluated under the framework set forth in *United States* v. *O'Brien*, 391 U. S. 367, for content-neutral restrictions on symbolic speech. Although being "in a state of nudity" is not an inherently expressive condition, nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection. See, *e. g., Barnes, supra,* at 565–566 (plurality opinion). What level of scrutiny applies is determined by whether the ordinance is related to the suppression of expression. *E. g., Texas* v. *Johnson*, 491 U. S. 397, 403. If the governmental purpose in enacting the ordinance is unrelated to such suppression, the ordinance need only satisfy the "less stringent," intermediate *O'Brien* standard. *E. g., Johnson, supra,* at 403. If the governmental interest is related to the expression's content, however, the ordinance falls outside *O'Brien* and must be justified under the more demanding, strict scrutiny standard. *Johnson, supra,* at 403. An almost identical public nudity ban was held not to violate the First Amendment in *Barnes*, although no five Members of the Court agreed on a single rationale for that conclusion. The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. By its terms, it regulates conduct alone. It does not target

nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. Although Pap's contends that the ordinance is related to the suppression of expression because its preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland, that is not how the Pennsylvania Supreme Court interpreted that language. Rather, the Pennsylvania Supreme Court construed the preamble to mean that one purpose of the ordinance was to combat negative secondary effects. That is, the ordinance is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland, and not at suppressing the erotic message conveyed by this type of nude dancing. See 391 U. S., at 382; see also *Boos* v. *Barry*, 485 U. S. 312, 321. The Pennsylvania Supreme Court's ultimate conclusion that the ordinance was nevertheless content based relied on Justice White's position in dissent in *Barnes* that a ban of this type *necessarily* has the purpose of suppressing the erotic message of the dance. That view was rejected by a majority of the Court in *Barnes*, and is here rejected again. Pap's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing is really an argument that Erie also had an illicit motive in enacting the ordinance. However, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. *O'Brien*, *supra*, at 382–383. Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is therefore *de minimis*. If States are to be able to regulate secondary effects, then such *de minimis* intrusions on expression cannot be sufficient to render the ordinance content based. See, *e. g.*, *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 299. Thus, Erie's ordinance is valid if it satisfies the *O'Brien* test. Pp. 289–296.

2. Erie's ordinance satisfies *O'Brien*'s four-factor test. First, the ordinance is within Erie's constitutional power to enact because the city's efforts to protect public health and safety are clearly within its police powers. Second, the ordinance furthers the important government interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing. In terms of demonstrating that such secondary effects pose a threat, the city need not conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence relied on is reasonably believed to be relevant to the problem addressed. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 51–52. Erie could reasonably

rely on the evidentiary foundation set forth in *Renton* and *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton, supra,* at 51–52. In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres.* The evidentiary standard described in *Renton* controls here, and Erie meets that standard. In any event, the ordinance's preamble also relies on the city council's express findings that "certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare . . . ." The council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at, and around, nude dancing establishments there, and can make particularized, expert judgments about the resulting harmful secondary effects. Cf., *e. g., FCC* v. *National Citizens Comm. for Broadcasting,* 436 U. S. 775. The fact that this sort of leeway is appropriate in this case, which involves a content-neutral restriction that regulates conduct, says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. Also, although requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, *O'Brien* requires only that the regulation further the interest in combating such effects. The ordinance also satisfies *O'Brien*'s third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra.* The fourth *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The pasties and G-string requirement is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See, *e. g., Barnes,* 501 U. S., at 572. Pp. 296–302.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that the Pennsylvania Supreme Court's decision must be reversed, but disagreed with the mode of analysis that should be applied. Erie self-consciously modeled its ordinance on the public nudity statute upheld in *Barnes* v. *Glen Theatre, Inc.,* 501 U. S. 560, calculating (one would have supposed reasonably) that the Pennsylvania courts would consider themselves bound by this Court's judgment on a question of federal constitutional law. That statute was constitutional not because it survived some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it was not subject to First Amendment scrutiny at all. *Id.,* at 572 (SCALIA, J., concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act—irrespective of whether it is engaged in for expressive purposes—of going nude in public. The facts that the preamble explains the ordinance's purpose, in part, as limiting a recent increase in nude live entertainment, that city councilmembers in supporting the ordinance commented to that effect, and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. That the city made no effort to enforce the ordinance against a production of Equus involving nudity that was being staged in Erie at the time the ordinance became effective does not render the ordinance discriminatory on its face. The assertion of the city's counsel in the trial court that the ordinance would not cover theatrical productions to the extent their expressive activity rose to a higher level of protected expression simply meant that the ordinance would not be enforceable against such productions if the Constitution forbade it. That limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct. Moreover, even if it could be concluded that Erie specifically singled out the activity of nude dancing, the ordinance still would not violate the First Amendment unless it could be proved (as on this record it could not) that it was the communicative character of nude dancing that prompted the ban. See *id.*, at 577. There is no need to identify "secondary effects" associated with nude dancing that Erie could properly seek to eliminate. The traditional power of government to foster good morals, and the acceptability of the traditional judgment that nude public dancing *itself* is immoral, have not been repealed by the First Amendment. Pp. 307–310.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and BREYER, JJ., joined, and an opinion with respect to Parts III and IV, in which REHNQUIST, C. J., and KENNEDY and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 302. SOUTER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 310. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 317.

*Gregory A. Karle* argued the cause for petitioners. With him on the briefs were *Gerald J. Villella* and *Valerie J. Sprenkle.*

*John H. Weston* argued the cause for respondent. With him on the briefs were *G. Randall Garrou, Philip B. Friedman,* and *Cathy Crosson.**

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join.

The city of Erie, Pennsylvania, enacted an ordinance banning public nudity. Respondent Pap's A. M. (hereinafter

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*Briefs of *amici curiae* urging reversal were filed for Brevard County, Florida, by *Scott L. Knox;* for the American Liberties Institute et al. by *Frederick H. Nelson, Lonnie N. Groot,* and *Anthony A. Garganese;* for Erie County Citizen's Coalition Against Violent Pornography by *Keith O. Barrows;* for Morality in Media, Inc., et al. by *Paul J. McGeady, Bruce A. Taylor,* and *Janet M. LaRue;* and for the National Family Legal Foundation by *Len L. Munsil.*

Briefs of *amici curiae* urging affirmance were filed for the American Association for Nude Recreation by *Robert T. Page;* for the American Civil Liberties Union et al. by *Steven R. Shapiro, Witold J. Walczak, Bruce J. Ennis, Jr.,* and *Paul M. Smith;* for Deja Vu Consulting, Inc., et al. by *Bradley J. Shafer;* for Feminists for Free Expression by *Mary D. Dorman;* for the First Amendment Lawyers Association by *Randall D. B. Tigue, Steven H. Swander,* and *Richard L. Wilson;* for the Thomas Jefferson Center for Protection of Free Expression et al. by *J. Joshua Wheeler;* and for Bill Conte, on behalf of *The Dante Project: Inferno* et al. by *Jack R. Burns.*

Briefs of *amici curiae* were filed for the State of Kansas et al. by *Carla J. Stovall,* Attorney General of Kansas, *Stephen R. McAllister,* State Solicitor, *Betty D. Montgomery,* Attorney General of Ohio, *Edward B. Foley,* State Solicitor, and *Elise Porter,* Assistant Solicitor, and by the Attorneys General for their respective States as follows: *Alan G. Lance* of Idaho, *Richard P. Ieyoub* of Louisiana, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Jan Graham* of Utah, and *Mark L. Earley* of Virginia; and for Orange County, Florida, by *Joel D. Prinsell.*

Pap's), which operated a nude dancing establishment in Erie, challenged the constitutionality of the ordinance and sought a permanent injunction against its enforcement. The Pennsylvania Supreme Court, although noting that this Court in *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560 (1991), had upheld an Indiana ordinance that was "strikingly similar" to Erie's, found that the public nudity sections of the ordinance violated respondent's right to freedom of expression under the United States Constitution. 553 Pa. 348, 356, 719 A. 2d 273, 277 (1998). This case raises the question whether the Pennsylvania Supreme Court properly evaluated the ordinance's constitutionality under the First Amendment. We hold that Erie's ordinance is a content-neutral regulation that satisfies the four-part test of *United States* v. *O'Brien*, 391 U. S. 367 (1968). Accordingly, we reverse the decision of the Pennsylvania Supreme Court and remand for the consideration of any remaining issues.

## I

On September 28, 1994, the city council for the city of Erie, Pennsylvania, enacted Ordinance 75–1994, a public indecency ordinance that makes it a summary offense to knowingly or intentionally appear in public in a "state of nudity."*

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*Ordinance 75–1994, codified as Article 711 of the Codified Ordinances of the city of Erie, provides in relevant part:

"1. A person who knowingly or intentionally, in a public place:

"a. engages in sexual intercourse

"b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

"c. appears in a state of nudity, or

"d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

"2. "Nudity" means the showing of the human male or female genital *[sic]*, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, Respondent Pap's, a Pennsylvania corporation, operated an establishment in Erie known as "Kandyland" that featured totally nude erotic dancing performed by women. To comply with the ordinance, these dancers must wear, at a minimum, "pasties" and a "G-string." On October 14, 1994, two days after the ordinance went into effect, Pap's filed a complaint against the city of Erie, the mayor of the city, and members of the city council, seeking declaratory relief and a permanent injunction against the enforcement of the ordinance.

The Court of Common Pleas of Erie County granted the permanent injunction and struck down the ordinance as unconstitutional. Civ. No. 60059–1994 (Jan. 18, 1995), Pet. for Cert. 40a. On cross appeals, the Commonwealth Court reversed the trial court's order. 674 A. 2d 338 (1996).

The Pennsylvania Supreme Court granted review and reversed, concluding that the public nudity provisions of the ordinance violated respondent's rights to freedom of expression as protected by the First and Fourteenth Amendments. 553 Pa. 348, 719 A. 2d 273 (1998). The Pennsylvania court first inquired whether nude dancing constitutes expressive conduct that is within the protection of the First Amendment. The court noted that the act of being nude, in and of

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perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

"3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

"4. The prohibition set forth in subsection 1(c) shall not apply to:

"a. Any child under ten (10) years of age; or

"b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age."

itself, is not entitled to First Amendment protection because it conveys no message. *Id.*, at 354, 719 A. 2d, at 276. Nude dancing, however, is expressive conduct that is entitled to some quantum of protection under the First Amendment, a view that the Pennsylvania Supreme Court noted was endorsed by eight Members of this Court in *Barnes.* 553 Pa., at 354, 719 A. 2d, at 276.

The Pennsylvania court next inquired whether the government interest in enacting the ordinance was content neutral, explaining that regulations that are unrelated to the suppression of expression are not subject to strict scrutiny but to the less stringent standard of *United States* v. *O'Brien, supra,* at 377. To answer the question whether the ordinance is content based, the court turned to our decision in *Barnes.* 553 Pa., at 355–356, 719 A. 2d, at 277. Although the Pennsylvania court noted that the Indiana statute at issue in *Barnes* "is strikingly similar to the Ordinance we are examining," it concluded that "[u]nfortunately for our purposes, the *Barnes* Court splintered and produced four separate, non-harmonious opinions." 553 Pa., at 356, 719 A. 2d, at 277. After canvassing these separate opinions, the Pennsylvania court concluded that, although it is permissible to find precedential effect in a fragmented decision, to do so a majority of the Court must have been in agreement on the concept that is deemed to be the holding. See *Marks* v. *United States,* 430 U. S. 188 (1977). The Pennsylvania court noted that "aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." 553 Pa., at 358, 719 A. 2d, at 278. Accordingly, the court concluded that "no clear precedent arises out of *Barnes* on the issue of whether the [Erie] ordinance . . . passes muster under the First Amendment." *Ibid.*

Having determined that there was no United States Supreme Court precedent on point, the Pennsylvania court conducted an independent examination of the ordinance to ascertain whether it was related to the suppression of expression. The court concluded that although one of the purposes of the ordinance was to combat negative secondary effects, "[i]nextricably bound up with this stated purpose is an unmentioned purpose . . . to impact negatively on the erotic message of the dance." *Id.*, at 359, 719 A. 2d, at 279. As such, the court determined the ordinance was content based and subject to strict scrutiny. The ordinance failed the narrow tailoring requirement of strict scrutiny because the court found that imposing criminal and civil sanctions on those who commit sex crimes would be a far narrower means of combating secondary effects than the requirement that dancers wear pasties and G-strings. *Id.*, at 361–362, 719 A. 2d, at 280.

Concluding that the ordinance unconstitutionally burdened respondent's expressive conduct, the Pennsylvania court then determined that, under Pennsylvania law, the public nudity provisions of the ordinance could be severed rather than striking the ordinance in its entirety. Accordingly, the court severed §§ 1(c) and 2 from the ordinance and reversed the order of the Commonwealth Court. *Id.*, at 363–364, 719 A. 2d, at 281. Because the court determined that the public nudity provisions of the ordinance violated Pap's right to freedom of expression under the United States Constitution, it did not address the constitutionality of the ordinance under the Pennsylvania Constitution or the claim that the ordinance is unconstitutionally overbroad. *Ibid.*

In a separate concurrence, two justices of the Pennsylvania court noted that, because this Court upheld a virtually identical statute in *Barnes*, the ordinance should have been upheld under the United States Constitution. 553 Pa., at 364, 719 A. 2d, at 281. They reached the same result as the majority, however, because they would have held that the public nudity sections of the ordinance violate the Pennsylvania Constitution. *Id.*, at 370, 719 A. 2d, at 284.

The city of Erie petitioned for a writ of certiorari, which we granted. 526 U. S. 1111 (1999). Shortly thereafter, Pap's filed a motion to dismiss the case as moot, noting that Kandyland was no longer operating as a nude dancing club, and Pap's was not operating a nude dancing club at any other location. Respondent's Motion to Dismiss as Moot 1. We denied the motion. 527 U. S. 1034 (1999).

## II

As a preliminary matter, we must address the justiciability question. " '[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979) (quoting *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969)). The underlying concern is that, when the challenged conduct ceases such that " 'there is no reasonable expectation that the wrong will be repeated,' " *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), then it becomes impossible for the court to grant " 'any effectual relief whatever' to [the] prevailing party," *Church of Scientology of Cal.* v. *United States*, 506 U. S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U. S. 651, 653 (1895)). In that case, any opinion as to the legality of the challenged action would be advisory.

Here, Pap's submitted an affidavit stating that it had "ceased to operate a nude dancing establishment in Erie." Status Report Re Potential Issue of Mootness 1 (Sept. 8, 1999). Pap's asserts that the case is therefore moot because "[t]he outcome of this case will have no effect upon Respondent." Respondent's Motion to Dismiss as Moot 1. Simply closing Kandyland is not sufficient to render this case moot, however. Pap's is still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie. See Petitioner's Brief in Opposition to Motion to Dismiss 3. JUSTICE SCALIA differs with our assessment as to the likelihood that Pap's may resume its nude dancing operation. Several Members of this Court can attest, however, that the "advanced age" of Pap's owner (72) does not make it "absolutely clear" that a life of quiet retirement is his only reasonable expectation. Cf. *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.,* 528 U. S. 167 (2000). Moreover, our appraisal of Pap's affidavit is influenced by Pap's failure, despite its obligation to the Court, to mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari, which was filed in April 1999, even though, as JUSTICE SCALIA points out, Kandyland was closed and that property sold in 1998. See *Board of License Comm'rs of Tiverton* v. *Pastore,* 469 U. S. 238, 240 (1985) *(per curiam).* Pap's only raised the issue after this Court granted certiorari.

In any event, this is not a run of the mill voluntary cessation case. Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. And it is the city of Erie that seeks to invoke the federal judicial power to obtain this Court's review of the Pennsylvania Supreme Court decision. Cf. *ASARCO Inc.* v. *Kadish,* 490 U. S. 605, 617–618 (1989). The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. See *Church of Scientology of Cal.* v. *United States, supra,* at 13. And Pap's still has a concrete stake in the outcome of this case because, to the extent Pap's has an interest in resuming operations, it has an interest in preserving the judgment of the Pennsylvania Supreme Court. Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here. See *United States* v. *W. T. Grant Co., supra,* at 632; cf. *Arizonans for Official English* v. *Arizona,* 520 U. S. 43, 74 (1997). Although the issue is close, we conclude that the case is not moot, and we turn to the merits.

## III

Being "in a state of nudity" is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection. See *Barnes* v. *Glen Theatre, Inc.*, 501 U. S., at 565–566 (plurality opinion); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 66 (1981).

To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." *Texas* v. *Johnson*, 491 U. S. 397, 403 (1989); see also *United States* v. *O'Brien*, 391 U. S., at 377. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the "less stringent" standard from *O'Brien* for evaluating restrictions on symbolic speech. *Texas* v. *Johnson*, *supra*, at 403; *United States* v. *O'Brien*, *supra*, at 377. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *Texas* v. *Johnson*, *supra*, at 403.

In *Barnes*, we analyzed an almost identical statute, holding that Indiana's public nudity ban did not violate the First Amendment, although no five Members of the Court agreed on a single rationale for that conclusion. We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.

The city of Erie argues that the ordinance is a content-neutral restriction that is reviewable under *O'Brien* because the ordinance bans conduct, not speech; specifically, public nudity. Respondent counters that the ordinance targets nude dancing and, as such, is aimed specifically at suppressing expression, making the ordinance a content-based restriction that must be subjected to strict scrutiny.

The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. 553 Pa., at 354, 719 A. 2d, at 277. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes*, the Erie ordinance replaces and updates provisions of an "Indecency and Immorality" ordinance that has been on the books since 1866, predating the prevalence of nude dancing establishments such as Kandyland. Pet. for Cert. 7a; see *Barnes* v. *Glen Theatre, Inc.*, *supra*, at 568.

Respondent and JUSTICE STEVENS contend nonetheless that the ordinance is related to the suppression of expression because language in the ordinance's preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland. *Post*, at 318 (dissenting opinion). That is not how the Pennsylvania Supreme Court interpreted that language, however. In the preamble to the ordinance, the city council stated that it was adopting the regulation

> " 'for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.' " 553 Pa., at 359, 719 A. 2d, at 279.

The Pennsylvania Supreme Court construed this language to mean that one purpose of the ordinance was "to combat negative secondary effects." *Ibid.*

As JUSTICE SOUTER noted in *Barnes*, "on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression." 501 U. S., at 585 (opinion concurring in judgment). In that sense, this case is similar to *O'Brien.* O'Brien burned his draft registration card as a public statement of his antiwar views, and he was convicted under a statute making it a crime to knowingly mutilate or destroy such a card. This Court rejected his claim that the statute violated his First Amendment rights, reasoning that the law punished him for the "noncommunicative impact of his conduct, and for nothing else." 391 U. S., at 382. In other words, the Government regulation prohibiting the destruction of draft cards was aimed at maintaining the integrity of the Selective Service System and not at suppressing the message of draft resistance that O'Brien sought to convey by burning his draft card. So too here, the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland and not at suppressing the erotic message conveyed by this type of nude dancing. Put another way, the ordinance does not attempt to regulate the primary effects of the expression, *i. e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such" establishment. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 47–48, 50 (1986); see also *Boos* v. *Barry*, 485 U. S. 312, 321 (1988).

Although the Pennsylvania Supreme Court acknowledged that one goal of the ordinance was to combat the negative secondary effects associated with nude dancing establishments, the court concluded that the ordinance was nevertheless content based, relying on Justice White's position in dissent in *Barnes* for the proposition that a ban of this type *necessarily* has the purpose of suppressing the erotic message of the dance. Because the Pennsylvania court agreed with Justice White's approach, it concluded that the ordinance must have another, "unmentioned" purpose related to the suppression of expression. 553 Pa., at 359, 719 A. 2d, at 279. That is, the Pennsylvania court adopted the dissent's view in *Barnes* that " '[s]ince the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition.' " 553 Pa., at 359, 719 A. 2d, at 279 (quoting *Barnes, supra,* at 592 (White, J., dissenting)). A majority of the Court rejected that view in *Barnes,* and we do so again here.

Respondent's argument that the ordinance is "aimed" at suppressing expression through a ban on nude dancing—an argument that respondent supports by pointing to statements by the city attorney that the public nudity ban was not intended to apply to "legitimate" theater productions—is really an argument that the city council also had an illicit motive in enacting the ordinance. As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. *O'Brien, supra,* at 382–383; *Renton* v. *Playtime Theatres, Inc., supra,* at 47–48 (that the "predominate" purpose of the statute was to control secondary effects was "more than adequate to establish" that the city's interest was unrelated to the suppression of expression). In light of the Pennsylvania court's determination that one purpose of the ordinance is to combat harmful secondary effects, the ban on public nudity here is no different from the ban on burning draft registration cards in *O'Brien,* where the Government sought to prevent the means of the expression and not the expression of antiwar sentiment itself.

JUSTICE STEVENS argues that the ordinance enacts a complete ban on expression. We respectfully disagree with that characterization. The public nudity ban certainly has the effect of limiting one particular means of expressing the kind of erotic message being disseminated at Kandyland. But simply to define what is being banned as the "message" is to assume the conclusion. We did not analyze the regulation in *O'Brien* as having enacted a total ban on expression. Instead, the Court recognized that the regulation against destroying one's draft card was justified by the Government's interest in preventing the harmful "secondary effects" of that conduct (disruption to the Selective Service System), even though that regulation may have some incidental effect on the expressive element of the conduct. Because this justification was unrelated to the suppression of O'Brien's antiwar message, the regulation was content neutral. Although there may be cases in which banning the means of expression so interferes with the message that it essentially bans the message, that is not the case here.

Even if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. See *Renton, supra,* at 50–51. In *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288 (1984), we held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D. C., in connection with a demonstration intended to call attention to the plight of the homeless. Assuming, *arguendo,* that sleeping can be expressive conduct, the Court concluded that the Government interest in conserving park property was unrelated to the demonstrators' message about homelessness. *Id.,* at 299.

So, while the demonstrators were allowed to erect "symbolic tent cities," they were not allowed to sleep overnight in those tents. Even though the regulation may have directly limited the expressive element involved in actually sleeping in the park, the regulation was nonetheless content neutral.

Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis.* And as JUSTICE STEVENS eloquently stated for the plurality in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 70 (1976), "even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," and "few of us would march our sons and daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at establishments like Kandyland. If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based. See *Clark* v. *Community for Creative Non-Violence, supra,* at 299; *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989) (even if regulation has an incidental effect on some speakers or messages but not others, the regulation is content neutral if it can be justified without reference to the content of the expression).

This case is, in fact, similar to *O'Brien, Community for Creative Non-Violence,* and *Ward.* The justification for the government regulation in each case prevents harmful "secondary" effects that are unrelated to the suppression of expression. See, *e. g., Ward* v. *Rock Against Racism, supra,* at 791–792 (noting that "[t]he principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the [adjacent] Sheep Meadow and its more sedate activities," and citing *Renton* for the proposition that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others"). While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity—nude erotic dancing—is particularly problematic because it produces harmful secondary effects.

JUSTICE STEVENS claims that today we "[f]or the first time" extend *Renton*'s secondary effects doctrine to justify restrictions other than the location of a commercial enterprise. *Post,* at 317 (dissenting opinion). Our reliance on *Renton* to justify other restrictions is not new, however. In *Ward,* the Court relied on *Renton* to evaluate restrictions on sound amplification at an outdoor bandshell, rejecting the dissent's contention that *Renton* was inapplicable. See *Ward* v. *Rock Against Racism, supra,* at 804, n. 1 (Marshall, J., dissenting) ("Today, for the first time, a majority of the Court applies *Renton* analysis to a category of speech far afield from that decision's original limited focus"). Moreover, Erie's ordinance does not effect a "total ban" on protected expression. *Post,* at 319.

In *Renton,* the regulation explicitly treated "adult" movie theaters differently from other theaters, and defined "adult" theaters solely by reference to the content of their movies. 475 U. S., at 44. We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. *Id.,* at

48. Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.

We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid if it satisfies the four-factor test from *O'Brien* for evaluating restrictions on symbolic speech.

## IV

Applying that standard here, we conclude that Erie's ordinance is justified under *O'Brien.* The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton* v. *Playtime Theatres, Inc., supra,* at 51–52. Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), and *California* v. *LaRue*, 409 U. S. 109 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton* v. *Playtime Theatres, Inc.*, *supra*, at 51–52 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient). In fact, Erie expressly relied on *Barnes* and its discussion of secondary effects, including its reference to *Renton* and *American Mini Theatres*. Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 393, n. 6 (2000). Regardless of whether JUSTICE SOUTER now wishes to disavow his opinion in *Barnes* on this point, see *post*, at 316–317 (opinion concurring in part and dissenting in part), the evidentiary standard described in *Renton* controls here, and Erie meets that standard.

In any event, Erie also relied on its own findings. The preamble to the ordinance states that "the Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity." Pet. for Cert. 6a (emphasis added). The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects. Analogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such "legislative facts" within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment. See *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U. S. 775 (1978); *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945); 2 K. Davis & R. Pierce, Administrative Law Treatise § 10.6 (3d ed. 1994). Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects—before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16–23.

Finally, it is worth repeating that Erie's ordinance is on its face a content-neutral restriction that regulates conduct, not First Amendment expression. And the government should have sufficient leeway to justify such a law based on secondary effects. On this point, *O'Brien* is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards. It simply reviewed the Government's various administrative interests in issuing the cards, and then concluded that "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them." 391 U. S., at 378–380. There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness in a case involving actual regulation of First Amendment expression. As we have said, so long as the regulation is unrelated to the suppression of expression, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson,* 491 U. S., at 406. See, *e. g., United States* v. *O'Brien, supra,* at 377; *United States* v. *Albertini,* 472 U. S. 675, 689 (1985) (finding sufficient the Government's assertion that those who had previously been barred from entering the military installation pose a threat to the security of that installation); *Clark* v. *Community for Creative Non-Violence,* 468 U. S., at 299 (finding sufficient the Government's assertion that camping overnight in the park poses a threat to park property).

JUSTICE SOUTER, however, would require Erie to develop a specific evidentiary record supporting its ordinance. *Post,* at 317 (opinion concurring in part and dissenting in part). JUSTICE SOUTER agrees that Erie's interest in combating the negative secondary effects associated with nude dancing establishments is a legitimate government interest unrelated to the suppression of expression, and he agrees that the ordinance should therefore be evaluated under *O'Brien. O'Brien,* of course, required no evidentiary showing at all that the threatened harm was real. But that case is different, JUSTICE SOUTER contends, because in *O'Brien* "there could be no doubt" that a regulation prohibiting the destruction of draft cards would alleviate the harmful secondary effects flowing from the destruction of those cards. *Post,* at 311, n. 1.

But whether the harm is evident to our "intuition," *ibid.,* is not the proper inquiry. If it were, we would simply say there is no doubt that a regulation prohibiting public nudity would alleviate the harmful secondary effects associated with nude dancing. In any event, JUSTICE SOUTER conflates two distinct concepts under *O'Brien:* whether there is a substantial government interest and whether the regulation furthers that interest. As to the government interest, *i. e.,* whether the threatened harm is real, the city council relied on this Court's opinions detailing the harmful secondary effects caused by establishments like Kandyland, as well as on its own experiences in Erie. JUSTICE SOUTER attempts to denigrate the city council's conclusion that the threatened harm was real, arguing that we cannot accept Erie's findings because the subject of nude dancing is "fraught with some emotionalism," *post,* at 314. Yet surely the subject of drafting our citizens into the military is "fraught" with more emotionalism than the subject of regulating nude dancing. *Ibid.* JUSTICE SOUTER next hypothesizes that the reason we cannot accept Erie's conclusion is that, since the question whether these secondary effects occur is "amenable to empirical treatment," we should ignore Erie's actual experience and instead require such an empirical analysis. *Post,* at 314–315, n. 3 (referring to a "scientifically sound" study offered by an *amicus curiae* to show that nude dancing establishments do not cause secondary effects). In *Nixon,* however, we flatly rejected that idea. 528 U. S., at 394 (noting that the "invocation of academic studies said to indicate" that the threatened harms are not real is insufficient to cast doubt on the experience of the local government).

As to the second point—whether the regulation furthers the government interest—it is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments like Kandyland, a ban on such nude dancing would further Erie's interest in preventing such secondary effects. To be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects, but *O'Brien* requires only that the regulation further the interest in combating such effects. Even though the dissent questions the wisdom of Erie's chosen remedy, *post,* at 323 (opinion of STEVENS, J.), the "'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems,'" *Renton* v. *Playtime Theatres, Inc.,* 475 U. S., at 52 (quoting *American Mini Theatres,* 427 U. S., at 71 (plurality opinion)). It also may be true that a pasties and G-string requirement would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further the city's interest.

The ordinance also satisfies *O'Brien*'s third factor, that the government interest is unrelated to the suppression of free expression, as discussed *supra,* at 289–296. The fourth and final *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See *Barnes* v. *Glen Theatre, Inc.,* 501 U. S., at 572 (plurality opinion of REHNQUIST, C. J., joined by O'CONNOR and KENNEDY, JJ.); *id.,* at 587 (SOUTER, J., concurring in judgment). JUSTICE SOUTER points out that zoning is an alternative means of addressing this problem. It is far from clear, however, that zoning imposes less of a burden on expression than the minimal requirement implemented here. In any event, since this is a content-neutral restriction, least restrictive means analysis is not required. See *Ward,* 491 U. S., at 798–799, n. 6.

We hold, therefore, that Erie's ordinance is a content-neutral regulation that is valid under *O'Brien.* Accordingly, the judgment of the Pennsylvania Supreme Court is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

## I

In my view, the case before us here is moot. The Court concludes that it is not because respondent could resume its nude dancing operations in the future, and because petitioners have suffered an ongoing, redressable harm consisting of the state court's invalidation of their public nudity ordinance.

As to the first point: Petitioners do not dispute that Kandyland no longer exists; the building in which it was located has been sold to a real estate developer, and the premises are currently being used as a comedy club. We have a sworn affidavit from respondent's sole shareholder, Nick Panos, to the effect that Pap's "operates no active business," and is "a 'shell' corporation." More to the point, Panos swears that neither Pap's nor Panos "employ[s] any individuals involved in the nude dancing business," "maintain[s] any contacts in the adult entertainment business," "has any current interest in any establishment providing nude dancing," or "has any intention to own or operate a nude dancing establishment in the future."[1] App. to Reply to Brief in Opposition to Motion to Dismiss 7–8.

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[1] Curiously, the Court makes no mention of Panos' averment of no intention to operate a nude dancing establishment in the future, but discusses the issue as though the only factor suggesting mootness is the closing of Kandyland. *Ante,* at 287–288. I see no basis for ignoring this aver-

Petitioners do not contest these representations, but offer in response only that Pap's *could* very easily get back into the nude dancing business. The Court adopts petitioners' line, concluding that because respondent is still incorporated in Pennsylvania, it "could again decide to operate a nude dancing establishment in Erie." *Ante,* at 287. That plainly does not suffice under our cases. The test for mootness we have applied in voluntary-termination cases is not whether the action originally giving rise to the controversy could not *conceivably* reoccur, but whether it is "absolutely clear that the . . . behavior could not *reasonably be expected to recur.*" *United States* v. *Concentrated Phosphate Export Assn., Inc.,* 393 U. S. 199, 203 (1968) (emphasis added). Here I think that test is met. According to Panos' uncontested sworn affidavit, Pap's ceased doing business at Kandyland, and the premises were sold to an independent developer, in 1998—the year before the petition for certiorari in this case was filed. It strains credulity to suppose that the 72-year-old Mr. Panos shut down his going business *after* securing his victory in the Pennsylvania Supreme Court, and before the city's petition for certiorari was even filed, in order to increase his chances of preserving his judgment in the statistically unlikely event that a (not yet filed) petition might be granted. Given the timing of these events, given the fact that respondent has no existing interest in nude dancing (or in any other business), given Panos' sworn representation that he does not intend to invest—through Pap's or otherwise—in any nude dancing business, and given Panos' ad-

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ment. The only fact mentioned by the Court to justify regarding it as perjurious is that respondent failed to raise mootness in its brief in opposition to the petition for certiorari. That may be good basis for censure, but it is scant basis for suspicion of perjury—particularly since respondent, far from seeking to "insulate a favorable decision from review," *ante,* at 288, asks us in light of the mootness to vacate the judgment below. Reply to Brief in Opposition to Motion to Dismiss 5.

vanced age,[2] it seems to me that there is "no reasonable *expectation*," even if there remains a theoretical possibility, that Pap's will resume nude dancing operations in the future.[3]

The situation here is indistinguishable from that which obtained in *Arizonans for Official English* v. *Arizona*, 520 U. S. 43 (1997), where the plaintiff-respondent, a state employee who had sued to enjoin enforcement of an amendment to the Arizona Constitution making English that State's official language, had resigned her public-sector employment. We held the case moot and, since the mootness was attributable to the " 'unilateral action of the party who prevailed in the lower court,' " we followed our usual practice of vacating the favorable judgment respondent had obtained in the

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[2] The Court asserts that "[s]everal Members of this Court can attest . . . that the 'advanced age' " of 72 "does not make it 'absolutely clear' that a life of quiet retirement is [one's] only reasonable expectation." *Ante*, at 288. That is *trés gallant*, but it misses the point. Now as heretofore, Justices in their seventies continue to do their work competently—indeed, perhaps better than their youthful colleagues because of the wisdom that age imparts. But to respond to my point, what the Court requires is citation of an instance in which a Member of this Court (or of any other court, for that matter) resigned at the age of 72 to begin a new career—or more remarkable still (for this is what the Court suspects the young Mr. Panos is up to) resigned at the age of 72 to go judge on a different court, of no greater stature, and located in Erie, Pennsylvania, rather than Palm Springs. I base my assessment of reasonable expectations not upon Mr. Panos' age alone, but upon that combined with his sale of the business and his assertion, under oath, that he does not intend to enter another.

[3] It is significant that none of the assertions of Panos' affidavit is contested. Those pertaining to the sale of Kandyland and the current noninvolvement of Pap's in any other nude dancing establishment would seem readily verifiable by petitioners. The statements regarding Pap's and Panos' intentions for the future are by their nature not verifiable, and it would be reasonable not to credit them if *either* petitioners asserted some reason to believe they were not true *or* they were not rendered highly plausible by Panos' age and his past actions. Neither condition exists here.

Court of Appeals. *Id.*, at 72 (quoting *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 23 (1994)).

The rub here is that this case comes to us on writ of certiorari to a state court, so that our lack of jurisdiction over the case also entails, according to our recent jurisprudence, a lack of jurisdiction to direct a vacatur. See *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 621, n. 1 (1989). The consequences of that limitation on our power are in this case significant: A dismissal for mootness caused by respondent's unilateral action would leave petitioners subject to an ongoing legal disability, and a large one at that. Because the Pennsylvania Supreme Court severed the public nudity provision from the ordinance, thus rendering it inoperative, the city would be prevented from enforcing its public nudity prohibition not only against respondent, should it decide to resume operations in the future, and not only against other nude dancing establishments, but against anyone who appears nude in public, regardless of the "expressiveness" of his conduct or his purpose in engaging in it.

That is an unfortunate consequence (which could be avoided, of course, if the Pennsylvania Supreme Court chose to vacate its judgments in cases that become moot during appeal). But it is not a consequence that authorizes us to entertain a suit the Constitution places beyond our power. And leaving in effect erroneous state determinations regarding the Federal Constitution is, after all, not unusual. It would have occurred here, even without the intervening mootness, if we had denied certiorari. And until the 1914 revision of the Judicial Code, it occurred *whenever* a state court erroneously sustained a federal constitutional challenge, since we did not even have *statutory* jurisdiction to entertain an appeal. Compare Judiciary Act of 1789, ch. 20, §25, 1 Stat. 85–87, with Act of Dec. 23, 1914, ch. 2, 38 Stat. 790. In any event, the short of the matter is that we have no power to suspend the fundamental precepts that federal courts "are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties," *Richardson* v. *Ramirez,* 418 U. S. 24, 36 (1974), and that this limitation applies "at all stages of review," *Preiser* v. *Newkirk,* 422 U. S. 395, 401 (1975) (quoting *Steffel* v. *Thompson,* 415 U. S. 452, 459, n. 10 (1974)) (internal quotation marks omitted).

Which brings me to the Court's second reason for holding that this case is still alive: The Court concludes that because petitioners have an "ongoing injury" caused by the state court's invalidation of its duly enacted public nudity provision, our ability to hear the case and reverse the judgment below is itself "sufficient to prevent the case from being moot." *Ante,* at 288. Although the Court does not cite any authority for the proposition that the burden of an adverse decision below suffices to keep a case alive, it is evidently relying upon our decision in *ASARCO,* which held that Article III's standing requirements were satisfied on writ of certiorari to a state court even though there would have been no Article III standing for the action producing the state judgment on which certiorari was sought. We assumed jurisdiction in the case because we concluded that the party seeking to invoke the federal judicial power had standing to challenge the adverse judgment entered against them by the state court. Because that judgment, if left undisturbed, would "caus[e] direct, specific, and concrete injury to the parties who petition for our review," *ASARCO,* 490 U. S., at 623–624, and because a decision by this Court to reverse the State Supreme Court would clearly redress that injury, we concluded that the original plaintiffs' lack of standing was not fatal to our jurisdiction, *id.,* at 624.

I dissented on this point in *ASARCO,* see *id.,* at 634 (REHNQUIST, C. J., concurring in part and dissenting in part, joined by SCALIA, J.), and remain of the view that it was incorrectly decided. But *ASARCO* at least did not purport to hold that the constitutional standing requirements of injury, causation, and redressability may be satisfied *solely* by reference to the lower court's adverse judgment. It was careful to note—however illogical that might have been, see *id.*, at 635—that the parties "remain[ed] adverse," and that jurisdiction was proper only so long as the "requisites of a case or controversy are also met," *id.*, at 619, 624. Today the Court would appear to drop even this fig leaf.[4] In concluding that the injury to *Erie* is "sufficient" to keep this case alive, the Court performs the neat trick of identifying a "case or controversy" that has only one interested party.

## II

For the reasons set forth above, I would dismiss this case for want of jurisdiction. Because the Court resolves the threshold mootness question differently and proceeds to address the merits, I will do so briefly as well. I agree that the decision of the Pennsylvania Supreme Court must be reversed, but disagree with the mode of analysis the Court has applied.

The city of Erie self-consciously modeled its ordinance on the public nudity statute we upheld against constitutional challenge in *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560 (1991), calculating (one would have supposed reasonably) that the courts of Pennsylvania would consider themselves bound by our judgment on a question of federal constitutional law. In *Barnes*, I voted to uphold the challenged Indiana statute "not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.*, at 572 (opinion concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act—irrespective of whether it is engaged in for expressive purposes—of going nude in public. The facts that a preamble to the ordinance explains that its purpose, in part, is to "limi[t] a recent increase in nude live entertainment," App. to Pet. for Cert. 42a, that city councilmembers in supporting the ordinance commented to that effect, see *post*, at 329–330, and n. 16 (STEVENS, J., dissenting), and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, see *post*, at 331, neither make the law any less general in its reach nor demonstrate that what the municipal authorities *really* find objectionable is expression rather than public nakedness. As far as appears (and as seems overwhelmingly likely), the preamble, the councilmembers' comments, and the chosen definition of the prohibited conduct simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers, or hot dog vendors, see *Barnes*, *supra*, at 574 (SCALIA, J., concurring in judgment), but with lap dancers.

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[4] I say "appear" because although the Court states categorically that "the availability of . . . relief [from the judgment below] is sufficient to prevent the case from being moot," it follows this statement, in the next sentence, with the assertion that Pap's, the state-court plaintiff, retains a "concrete stake in the outcome of this case." *Ante*, at 288. Of course, if the latter were true a classic case or controversy existed, and resort to the exotic theory of "standing by virtue of adverse judgment below" was entirely unnecessary.

There is no basis for the contention that the ordinance does not apply to nudity in theatrical productions such as Equus or Hair. Its text contains no such limitation. It was stipulated in the trial court that no effort was made to enforce the ordinance against a production of Equus involving nudity that was being staged in Erie at the time the ordinance became effective. App. 84. Notwithstanding JUSTICE STEVENS' assertion to the contrary, however, see *post*, at 328, neither in the stipulation, nor elsewhere in the record, does it appear that the city was aware of the nudity—and before this Court counsel for the city attributed nonenforcement not to a general exception for theatrical productions, but to the fact that no one had complained. Tr. of Oral Arg. 16. One instance of nonenforcement—against a play already in production that prosecutorial discretion might reasonably have "grandfathered"—does not render this ordinance discriminatory on its face. To be sure, in the trial court counsel for the city said that "[t]o the extent that the expressive activity that is contained in [such] productions rises to a higher level of protected expression, they would not be [covered]," App. 53—but he rested this assertion upon the provision in the preamble that expressed respect for "fundamental Constitutional guarantees of free speech and free expression," and the provision of Paragraph 6 of the ordinance that provided for severability of unconstitutional provisions, *id.*, at 53–54.[5] What he was saying there (in order to fend off the overbreadth challenge of respondent, who was in no doubt that the ordinance *did* cover theatrical productions, see *id.*, at 55) was essentially what he said at oral argument before this Court: that the ordinance would not be enforceable against theatrical productions if the Constitution forbade it. Tr. of Oral Arg. 13. Surely that limitation does not cause the ordinance to be not generally applicable, in the relevant sense of being *targeted* against expressive conduct.[6]

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[5] This followup explanation rendered what JUSTICE STEVENS calls counsel's "categorical" assertion that such productions would be exempt, see *post*, at 328, n. 12, notably *un*categorical. Rather than accept counsel's explanation—in the trial court and here—that is compatible with the text of the ordinance, JUSTICE STEVENS rushes to assign the ordinance a meaning that its words cannot bear, on the basis of counsel's initial footfault. That is not what constitutional adjudication ought to be.

[6] To correct JUSTICE STEVENS' characterization of my present point: I do not argue that Erie "carved out an exception" for Equus and Hair. *Post*, at 328, n. 14. Rather, it is my contention that the city attorney assured the trial court that the ordinance was susceptible of an interpretation that would carve out such exceptions to the extent the Constitution required them. Contrary to JUSTICE STEVENS' view, *ibid.*, I do not believe that a law directed against all public nudity ceases to be a "general law" (rather than one directed at expression) if it makes exceptions for nudity protected by decisions of this Court. To put it another way, I do not think a law contains the vice of being directed against expression if it bans all public nudity, except that public nudity which the Supreme Court has held cannot be banned because of its expressive content.

Moreover, even were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only "[w]here the government prohibits conduct precisely because of its communicative attributes." *Barnes*, 501 U. S., at 577 (emphasis deleted). Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals *(bonos mores)*, and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.

Justice Souter, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion and agree with the analytical approach that the plurality employs in deciding this case. Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression under *United States* v. *O'Brien*, 391 U. S. 367 (1968), and the city's regulation is thus properly considered under the *O'Brien* standards. I do not believe, however, that the current record allows us to say that the city has made a sufficient evidentiary showing to sustain its regulation, and I would therefore vacate the decision of the Pennsylvania Supreme Court and remand the case for further proceedings.

## I

In several recent cases, we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment. See, *e. g., Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377 (2000); *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180 (1997) *(Turner II); Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622 (1994) *(Turner I).* Those cases do not identify with any specificity a particular quantum of evidence, nor do I seek to do so in this brief concurrence.[1] What the cases do make plain, however, is that application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue.

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[1] As explained below, *infra,* at 316, the issue of evidentiary justification was never joined, and with a multiplicity of factors affecting the analysis, a general formulation of the quantum required under *United States* v. *O'Brien,* 391 U. S. 367 (1968), will at best be difficult. A lesser showing may suffice when the means-end fit is evident to the untutored intuition. As we said in *Nixon,* "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 528 U. S., at 391. (In *O'Brien,* for example, the secondary effects that the Government identified flowed from the destruction of draft cards, and there could be no doubt that a regulation prohibiting that destruction would alleviate the concomitant harm.) The nature of the legislating institution might also affect the calculus. We do not require Congress to create a record in the manner of an administrative agency, see *Turner II,* 520 U. S. 180, 213 (1997), and we accord its findings greater respect than those of agencies. See *id.,* at 195. We might likewise defer less to a city council than we would to Congress. The need for evidence may be especially acute when a regulation is content based on its face and is analyzed as content neutral only because of the secondary effects doctrine. And it may be greater when the regulation takes the form of a ban, rather than a time, place, or manner restriction.

In *Turner I,* for example, we stated that

> "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' *Quincy Cable TV, Inc.* v. *FCC,* 768 F. 2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.,* at 664 (plurality opinion).

The plurality concluded there, of course, that the record, though swollen by three years of hearings on the Cable Television Consumer Protection and Competition Act of 1992, was insufficient to permit the necessary determinations and remanded for a more thorough factual development. When the case came back to us, in *Turner II,* a majority of the Court reiterated those requirements, characterizing the enquiry into the acceptability of the Government's regulations as one that turned on whether they "were designed to address a real harm, and whether those provisions will alleviate it in a material way." 520 U. S., at 195. Most recently, in *Nixon,* we repeated that "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden," 528 U. S., at 392, and we examined the "evidence introduced into the record by petitioners or cited by the lower courts in this action . . . ," *id.,* at 393.

The focus on evidence appearing in the record is consistent with the approach earlier applied in *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976), and *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41 (1986). In *Young,* Detroit adopted a zoning ordinance requiring dispersal of adult theaters through the city and prohibiting them within 500 feet of a residential area. Urban planners and real estate experts attested to the harms created by clusters of such theaters, see 427 U. S., at 55, and we found that "[t]he record discloses a factual basis" supporting the efficacy of Detroit's chosen remedy, *id.*, at 71. In *Renton*, the city similarly enacted a zoning ordinance requiring specified distances between adult theaters and residential zones, churches, parks, or schools. See 475 U. S., at 44. The city "held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities." *Ibid.* We found that Renton's failure to conduct its own studies before enacting the ordinance was not fatal; "[t]he First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*, at 51–52.

The upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed.[2] See, *e. g.*, *Edenfield* v. *Fane*, 507 U. S. 761, 770–773 (1993) (striking down regulation of commercial speech for failure to show direct and material efficacy). That evidentiary basis may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under consideration and actually relied upon. I will assume, further, that the reliance may be shown by legislative invocation of a judicial opinion that accepted an evidentiary foundation as sufficient for a similar regulation. What is clear is that the evidence of reliance must be a matter of demonstrated fact, not speculative supposition.

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[2] The plurality excuses Erie from this requirement with the simple observation that "it is evident" that the regulation will have the required efficacy. *Ante*, at 300. The *ipse dixit* is unconvincing. While I do agree that evidentiary demands need not ignore an obvious fit between means and ends, see n. 1, *supra*, it is not obvious that this is such a case. It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude. If the plurality does find it apparent, we may have to agree to disagree.

By these standards, the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, see *ante*, at 297–298, but the pickings are slim. The plurality quotes the ordinance's preamble asserting that over the course of more than a century the city council had expressed "findings" of detrimental secondary effects flowing from lewd and immoral profitmaking activity in public places. But however accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism. The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge. *Ante*, at 298. The analogy is not obvious; agencies are part of the executive branch and we defer to them in part to allow them the freedom necessary to reconcile competing policies. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–845 (1984). That aside, it is one thing to accord administrative leeway as to predictive judgments in applying " 'elusive concepts' " to circumstances where the record is inconclusive and "evidence . . . is difficult to compile," *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U. S. 775, 796–797 (1978), and quite another to dispense with evidence of current fact as a predicate for banning a subcategory of expression.[3] As to current fact, the city council's closest approach to an evidentiary record on secondary effects and their causes was the statement of one councilor, during the debate over the ordinance, who spoke of increases in sex crimes in a way that might be construed as a reference to secondary effects. See App. 44. But that reference came at the end of a litany of concerns ("free condoms in schools, drive-by shootings, abortions, suicide machines," and declining student achievement test scores) that do not seem to be secondary effects of nude dancing. *Ibid.* Nor does the invocation of *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560 (1991), in one paragraph of the preamble to Erie's ordinance suffice. App. to Pet. for Cert. 42a. The plurality opinion in *Barnes* made no mention of evidentiary showings at all, and though my separate opinion did make a pass at the issue, I did not demand reliance on germane evidentiary demonstrations, whether specific to the statute in question or developed elsewhere. To invoke *Barnes*, therefore, does not indicate that the issue of evidence has been addressed.

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[3] The proposition that the presence of nude dancing establishments increases the incidence of prostitution and violence is amenable to empirical treatment, and the city councilors who enacted Erie's ordinance are in a

There is one point, however, on which an evidentiary record is not quite so hard to find, but it hurts, not helps, the city. The final *O'Brien* requirement is that the incidental speech restriction be shown to be no greater than essential to achieve the government's legitimate purpose. 391 U. S., at 377. To deal with this issue, we have to ask what basis there is to think that the city would be unsuccessful in countering any secondary effects by the significantly lesser restriction of zoning to control the location of nude dancing, thus allowing for efficient law enforcement, restricting effects on property values, and limiting exposure of the public.

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position to look to the facts of their own community's experience as well as to experiences elsewhere. Their failure to do so is made all the clearer by one of the *amicus* briefs, largely devoted to the argument that scientifically sound studies show no such correlation. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16–23; *id.*, at App. 1–29.

The record shows that for 23 years there has been a zoning ordinance on the books to regulate the location of establishments like Kandyland, but the city has not enforced it. One councilor remarked that "I think there's one of the problems. The ordinances are on the books and not enforced. Now this takes place. You really didn't need any other ordinances." App. 43. Another commented, "I felt very, very strongly, and I feel just as strongly right now, that this is a zoning matter." *Id.*, at 45. Even on the plurality's view of the evidentiary burden, this hurdle to the application of *O'Brien* requires an evidentiary response.

The record suggests that Erie simply did not try to create a record of the sort we have held necessary in other cases, and the suggestion is confirmed by the course of this litigation. The evidentiary question was never decided (or, apparently, argued) below, nor was the issue fairly joined before this Court. While respondent did claim that the evidence before the city council was insufficient to support the ordinance, see Brief for Respondent 44–49, Erie's reply urged us not to consider the question, apparently assuming that *Barnes* authorized us to disregard it. See Reply Brief for Petitioners 6–8. The question has not been addressed, and in that respect this case has come unmoored from the general standards of our First Amendment jurisprudence.[4]

Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes, supra.* I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "'Ignorance, sir, ignorance.'" *McGrath* v. *Kristensen*, 340 U. S. 162, 178 (1950) (concurring opinion).[5] I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late. See *Henslee* v. *Union Planters Nat. Bank & Trust Co.*, 335 U. S. 595, 600 (1949) *(per curiam)* (Frankfurter, J., dissenting).

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[4] By contrast, federal courts in other cases have frequently demanded evidentiary showings. See, *e. g., Phillips* v. *Keyport*, 107 F. 3d 164, 175 (CA3 1997) (en banc); *J&B Entertainment, Inc.* v. *Jackson*, 152 F. 3d 362, 370–371 (CA5 1998).

## II

The record before us now does not permit the conclusion that Erie's ordinance is reasonably designed to mitigate real harms. This does not mean that the required showing cannot be made, only that, on this record, Erie has not made it. I would remand to give it the opportunity to do so.[6] Accordingly, although I join with the plurality in adopting the *O'Brien* test, I respectfully dissent from the Court's disposition of the case.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. The Court's commendable attempt to replace the fractured decision in *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560 (1991), with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning.

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[5] See Boswell, Life of Samuel Johnson, in 44 Great Books of the Western World 82 (R. Hutchins & M. Adler eds. 1952).

[6] This suggestion does not, of course, bar the Pennsylvania Supreme Court from choosing simpler routes to disposition of the case if they exist. Respondent mounted a federal overbreadth challenge to the ordinance; it also asserted a violation of the Pennsylvania Constitution. Either one of these arguments, if successful, would obviate the need for the factual development that is a prerequisite to *O'Brien* analysis.

## I

As the preamble to Ordinance No. 75–1994 candidly acknowledges, the council of the city of Erie enacted the restriction at issue "for the purpose of limiting a recent increase in nude live entertainment within the City." *Ante*, at 290 (internal quotation marks omitted). Prior to the enactment of the ordinance, the dancers at Kandyland performed in the nude. As the Court recognizes, after its enactment they can perform precisely the same dances if they wear "pasties and G-strings." *Ante*, at 294; see also *ante*, at 313, n. 2 (SOUTER, J., concurring in part and dissenting in part). In both instances, the erotic messages conveyed by the dancers to a willing audience are a form of expression protected by the First Amendment. *Ante*, at 289.[1] Despite the similarity between the messages conveyed by the two forms of dance, they are not identical.

If we accept Chief Judge Posner's evaluation of this art form, see *Miller* v. *South Bend*, 904 F. 2d 1081, 1089–1104 (CA7 1990) (en banc), the difference between the two messages is significant. The plurality assumes, however, that the difference in the content of the message resulting from the mandated costume change is "*de minimis.*" *Ante,* at 294. Although I suspect that the patrons of Kandyland are more likely to share Chief Judge Posner's view than the plurality's, for present purposes I shall accept the assumption that the difference in the message is small. The crucial point to remember, however, is that whether one views the difference as large or small, nude dancing still receives First Amendment protection, even if that protection lies only in the "outer ambit" of that Amendment. *Ante,* at 289. Erie's ordinance, therefore, burdens a message protected by the First Amendment. If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned;[2] if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.

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[1] Respondent does not contend that there is a constitutional right to engage in conduct such as lap dancing. The message of eroticism conveyed by the nudity aspect of the dance is quite different from the issue of the proximity between dancer and audience. Respondent's contention is not that Erie has focused on lap dancers, see *ante*, at 308 (SCALIA, J., concurring in judgment), but that it has focused on the message conveyed by nude dancing.

The plurality relies on the so-called "secondary effects" test to defend the ordinance. *Ante,* at 290–296. The present use of that rationale, however, finds no support whatsoever in our precedents. Never before have we approved the use of that doctrine to justify a total ban on protected First Amendment expression. On the contrary, we have been quite clear that the doctrine would not support that end.

In *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976), we upheld a Detroit zoning ordinance that placed special restrictions on the location of motion picture theaters that exhibited "adult" movies. The "secondary effects" of the adult theaters on the neighborhoods where they were located—lower property values and increases in crime (especially prostitution) to name a few—justified the burden imposed by the ordinance. *Id.*, at 54, 71, and n. 34 (plurality opinion). Essential to our holding, however, was the fact that the ordinance was "nothing more than a limitation on the place where adult films may be exhibited" and did not limit the size of the market in such speech. *Id.*, at 71; see also *id.*, at 61, 63, n. 18, 70, 71, n. 35. As Justice Powell emphasized in his concurrence:

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[2] Although nude dancing might be described as one protected "means" of conveying an erotic message, it does not follow that a protected message has not been totally banned simply because there are other, similar ways to convey erotic messages. See *ante,* at 292–293. A State's prohibition of a particular book, for example, does not fail to be a total ban simply because other books conveying a similar message are available.

> "At most the impact of the ordinance on [the First Amendment] interests is incidental and minimal. Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them. The ordinance is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience." *Id.*, at 78–79.

See also *id.*, at 81, n. 4 ("[A] zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression").

In *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), we upheld a similar ordinance, again finding that the "secondary effects of such theaters on the surrounding community" justified a restrictive zoning law. *Id.*, at 47 (emphasis deleted). We noted, however, that "[t]he Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether," but merely "circumscribe[s] their choice as to location." *Id.*, at 46, 48; see also *id.*, at 54 ("In our view, the First Amendment requires . . . that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city . . ."). Indeed, in both *Renton* and *American Mini Theatres*, the zoning ordinances were analyzed as mere "time, place, and manner" regulations.[3] See *Renton*, 475 U. S., at 46; *American Mini Theatres*, 427 U. S., at 63, and n. 18; *id.*, at 82, n. 6. Because time, place, and manner regulations must "leave open ample alternative channels for communication of the information," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989), a total ban would necessarily fail that test.[4]

And we so held in *Schad* v. *Mount Ephraim*, 452 U. S. 61 (1981). There, we addressed a zoning ordinance that did not merely require the dispersal of adult theaters, but prohibited them altogether. In striking down that law, we focused precisely on that distinction, holding that the secondary effects analysis endorsed in the past did not apply to an ordinance that totally banned nude dancing: "The restriction [in *Young* v. *American Mini Theatres*] did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide." *Id.*, at 71 (plurality opinion); see also *id.*, at 76; *id.*, at 77 (Blackmun, J., concurring) (joining plurality); *id.*, at 79 (Powell, J., concurring) (same).

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[3] The plurality contends, *ante*, at 295, that *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), shows that we have used the secondary effects rationale to justify more burdensome restrictions than those approved in *Renton* and *American Mini Theatres*. That argument is unpersuasive for two reasons. First, as in the two cases just mentioned, the regulation in *Ward* was as a time, place, and manner restriction. See 491 U. S., at 791; *id.*, at 804 (Marshall, J., dissenting). Second, as discussed below, *Ward* is not a secondary effects case. See *infra*, at 325–326.

[4] We also held in *Renton* that in enacting its adult theater zoning ordinance, the city of Renton was permitted to rely on a detailed study conducted by the city of Seattle that examined the relationship between zoning controls and the secondary effects of adult theaters. (It was permitted to rely as well on "the 'detailed findings' summarized" in an opinion of the Washington Supreme Court to the same effect.) 475 U. S., at 51–52. Renton, having identified the same problem in its own city as that experienced in Seattle, quite logically drew on Seattle's experience and adopted a similar solution. But if Erie is relying on the Seattle study as well (as the plurality suggests, *ante*, at 296–297), its use of that study is most peculiar. After identifying a problem in its own city similar to that in Seattle, Erie has implemented a solution (pasties and G-strings) bearing no relationship to the efficacious remedy identified by the Seattle study (dispersal through zoning).

But the city of Erie, of course, has not in fact pointed to any study by anyone suggesting that the adverse secondary effects of commercial enterprises featuring erotic dancing depends in the slightest on the precise costume worn by the performers—it merely assumes it to be so. See *infra*, at 323–324. If the city is permitted simply to assume that a slight addition to the dancers' costumes will sufficiently decrease secondary effects, then presumably the city can require more and more clothing as long as any danger of adverse effects remains.

The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition, whereas a total ban is the most exacting of restrictions. The State's interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden.[5] Yet it is perfectly clear that in the present case—to use Justice Powell's metaphor in *American Mini Theatres*—the city of Erie has totally silenced a message the dancers at Kandyland want to convey. The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship. For these reasons, the Court's holding rejects the explicit reasoning in *American Mini Theatres* and *Renton* and the express holding in *Schad.*

The Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles. Ordinarily, laws regulating the primary effects of speech, *i. e.*, the intended persuasive effects caused by the speech, are presumptively invalid. Under today's opinion, a State may totally ban speech based on its secondary effects—which are defined as those effects that "happen to be associated" with speech, *Boos* v. *Barry*, 485 U. S. 312, 320–321 (1988); see *ante*, at 291—yet the regulation is not presumptively invalid. Because the category of effects that "happen to be associated" with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence.

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[5] As the plurality recognizes by quoting my opinion in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 70 (1976), see *ante,* at 294, "the First Amendment will not tolerate the total suppression of erotic materials that have some artistic value," though it will permit zoning regulations.

## II

The plurality's mishandling of our secondary effects cases is not limited to its approval of a total ban. It compounds that error by dramatically reducing the degree to which the State's interest must be furthered by the restriction imposed on speech, and by ignoring the critical difference between secondary effects caused by speech and the incidental effects on speech that may be caused by a regulation of conduct.

In what can most delicately be characterized as an enormous understatement, the plurality concedes that "requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects." *Ante*, at 301. To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. It would be more accurate to acknowledge, as JUSTICE SCALIA does, that there is no reason to believe that such a requirement "will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease." *Ante*, at 310 (opinion concurring in judgment); see also *ante*, at 313, n. 2 (SOUTER, J., concurring in part and dissenting in part). Nevertheless, the plurality concludes that the "less stringent" test announced in *United States* v. *O'Brien*, 391 U. S. 367 (1968), "requires only that the regulation further the interest in combating such effects," *ante,* at 301; see also *ante,* at 289. It is one thing to say, however, that *O'Brien* is more lenient than the "more demanding standard" we have imposed in cases such as *Texas* v. *Johnson,* 491 U. S. 397 (1989). See *ante,* at 289. It is quite another to say that the test can be satisfied by nothing more than the mere possibility of *de minimis* effects on the neighborhood.

The plurality is also mistaken in equating our secondary effects cases with the "incidental burdens" doctrine applied in cases such as *O'Brien;* and it aggravates the error by invoking the latter line of cases to support its assertion that Erie's ordinance is unrelated to speech. The incidental burdens doctrine applies when "'speech' and 'nonspeech' elements are combined in the same course of conduct," and the government's interest in regulating the latter justifies incidental burdens on the former. *O'Brien,* 391 U. S., at 376. Secondary effects, on the other hand, are indirect consequences of protected speech and may justify regulation of the places where that speech may occur. See *American Mini Theatres,* 427 U. S., at 71, n. 34 ("[A] concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime").[6] When a State enacts a regulation, it might focus on the secondary effects of speech as its aim, or it might concentrate on nonspeech related concerns, having no thoughts at all with respect to how its regulation will affect speech—and only later, when the regulation is found to burden speech, justify the imposition as an unintended incidental consequence.[7] But those interests are not the same, and the plurality cannot ignore their differences and insist that both aims are equally unrelated to speech simply because Erie might have "recogniz[ed]" that it could possibly have had either aim in mind. See *ante*, at 295.[8] One can think of an apple and an orange at the same time; that does not turn them into the same fruit.

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[6] A secondary effect on the neighborhood that "happen[s] to be associated with" a form of speech is, of course, critically different from "the direct impact of speech on its audience." *Boos* v. *Barry,* 485 U. S. 312, 320–321 (1988). The primary effect of speech is the persuasive effect of the message itself.

[7] In fact, the very notion of focusing in on incidental burdens at the time of enactment appears to be a contradiction in terms. And if it were not the case that there is a difference between laws aimed at secondary effects and general bans incidentally burdening speech, then one wonders why

Of course, the line between governmental interests aimed at conduct and unrelated to speech, on the one hand, and interests arising out of the effects of the speech, on the other, may be somewhat imprecise in some cases. In this case, however, we need not wrestle with any such difficulty because Erie has expressly justified its ordinance with reference to secondary effects. Indeed, if Erie's concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message.[9] For these reasons, the plurality's argument that "this case is similar to *O'Brien*," *ante*, at 291; see also *ante*, at 294, is quite wrong, as are its

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JUSTICES SCALIA and SOUTER adopted such strikingly different approaches in *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560 (1991).

[8] I frankly do not understand the plurality's declaration that a State's interest in the secondary effects of speech that are "associated" with the speech are not "related" to the speech. *Ante*, at 296. See, *e. g.*, Webster's Third New International Dictionary 132 (1966) (defining "associate" as "closely related"). Sometimes, though, the plurality says that the secondary effects are "caused" by the speech, rather than merely "associated with" the speech. See, *e. g., ante*, at 291, 293, 297, 300. If that is the definition of secondary effects the plurality adopts, then it is even more obvious that an interest in secondary effects is related to the speech at issue. See *Barnes*, 501 U. S., at 585–586 (SOUTER, J., concurring in judgment) (secondary effects are not related to speech because their connection to speech is only one of correlation, not causation).

[9] As Justice Powell said in his concurrence in *Young* v. *American Mini Theatres*, 427 U. S., at 82, n. 4: "[H]ad [Detroit] been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." Quite plainly, Erie's total ban evinces its concern with the message being regulated.

citations to *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288 (1984), and *Ward* v. *Rock Against Racism,* 491 U. S. 781 (1989), *ante,* at 293–295, neither of which involved secondary effects. The plurality cannot have its cake and eat it too—either Erie's ordinance was not aimed at speech and the plurality may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the plurality can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.

Correct analysis of the issue in this case should begin with the proposition that nude dancing is a species of expressive conduct that is protected by the First Amendment. As Chief Judge Posner has observed, nude dancing fits well within a broad, cultural tradition recognized as expressive in nature and entitled to First Amendment protection. See 904 F. 2d, at 1089–1104; see also Note, 97 Colum. L. Rev. 1844 (1997). The nudity of the dancer is both a component of the protected expression and the specific target of the ordinance. It is pure sophistry to reason from the premise that the regulation of the nudity component of nude dancing is unrelated to the message conveyed by nude dancers. Indeed, both the text of the ordinance and the reasoning in the plurality's opinion make it pellucidly clear that the city of Erie has prohibited nude dancing *"precisely because of its communicative attributes." Barnes,* 501 U. S., at 577 (SCALIA, J., concurring in judgment) (emphasis in original); see *id.,* at 596 (White, J., dissenting).

## III

The censorial purpose of Erie's ordinance precludes reliance on the judgment in *Barnes* as sufficient support for the Court's holding today. Several differences between the Erie ordinance and the statute at issue in *Barnes* belie the plurality's assertion that the two laws are "almost identical."

*Ante*, at 289. To begin with, the preamble to Erie's ordinance candidly articulates its agenda, declaring:

> "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U. S. Supreme Court in *Barnes vs. Glen Theatre Inc., . . . for the purpose of limiting a recent increase in nude live entertainment within the City.*" App. to Pet. for Cert. 42a (emphasis added); see also *ante*, at 290.[10]

As its preamble forthrightly admits, the ordinance's "purpose" is to "limi[t]" a protected form of speech; its invocation of *Barnes* cannot obliterate that professed aim.[11]

Erie's ordinance differs from the statute in *Barnes* in another respect. In *Barnes*, the Court expressly observed that the Indiana statute had not been given a limiting construction by the Indiana Supreme Court. As presented to this Court, there was nothing about the law itself that would confine its application to nude dancing in adult entertainment establishments. See 501 U. S., at 564, n. 1 (discussing Indiana Supreme Court's lack of a limiting construction); see also *id.*, at 585, n. 2 (SOUTER, J., concurring in judgment).

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[10] The preamble also states: "[T]he Council of the City of Erie has [found] . . . that certain lewd, immoral activities carried on in public places for profit . . . lead to the debasement of both women and men . . . ." App. to Pet. for Cert. 41a.

[11] Relying on five words quoted from the Supreme Court of Pennsylvania, the plurality suggests that I have misinterpreted that court's reading of the preamble. *Ante*, at 290. What follows, however, is a more complete statement of what that court said on this point:

"We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance. . . . We believe . . . that the stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." 553 Pa. 348, 359, 719 A. 2d 273, 279 (1998).

Erie's ordinance, however, comes to us in a much different posture. In an earlier proceeding in this case, the Court of Common Pleas asked Erie's counsel "what effect would this ordinance have on theater . . . productions such as Equus, Hair, O[h!] Calcutta[!]? Under your ordinance would these things be prevented . . . ?" Counsel responded: "No, they wouldn't, Your Honor." App. 53.[12] Indeed, as *stipulated* in the record, the city permitted a production of Equus to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved in the production. *Id.*, at 84.[13] Even if, in light of its broad applicability, the statute in *Barnes* was not aimed at a particular form of speech, Erie's ordinance is quite different. As presented to us, the ordinance is deliberately targeted at Kandyland's type of nude dancing (to the exclusion of plays like Equus), in terms of both its applicable scope and the city's enforcement.[14]

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[12] In my view, Erie's categorical response forecloses JUSTICE SCALIA's assertion that the city's position on Equus and Hair was limited to "[o]ne instance," where "the city was [not] aware of the nudity," and "no one had complained." *Ante*, at 308 (opinion concurring in judgment). Nor could it be contended that selective applicability by stipulated enforcement should be treated differently from selective applicability by statutory text. See *Barnes*, 501 U. S., at 574 (SCALIA, J., concurring in judgment) (selective enforcement may affect a law's generality). Were it otherwise, constitutional prohibitions could be circumvented with impunity.

[13] The stipulation read: "The play, 'Equus' featured frontal nudity and was performed for several weeks in October/November 1994 at the Roadhouse Theater in downtown Erie with no efforts to enforce the nudity prohibition which became effective during the run of the play."

[14] JUSTICE SCALIA argues that Erie might have carved out an exception for Equus and Hair because it guessed that this Court would consider them protected forms of expression, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 550, 557–558 (1975) (holding that Hair, including the "group nudity and simulated sex" involved in the production, is protected speech); in his view, that makes the distinction unobjectionable and renders the ordinance no less of a general law. *Ante*, at 309 (opinion concurring in judgment). This argument appears to contradict his earlier definition of a general law: "A law is 'general' . . . if it regulates conduct

This narrow aim is confirmed by the expressed views of the Erie City Councilmembers who voted for the ordinance. The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general. One lawmaker observed: "We're not talking about nudity. We're not talking about the theater or art . . . . We're talking about what is indecent and immoral. . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." App. 39. Though not quite as succinct, the other councilmembers expressed similar convictions. For example, one member illustrated his understanding of the aim of the law by contrasting it with his recollection about high school students swimming in the nude in the school's pool. The ordinance was not intended to cover those incidents of nudity: "But what I'm getting at is [the swimming] wasn't indecent, it wasn't an immoral thing, and

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without regard to whether that conduct is expressive." *Barnes* v. *Glen Theatre, Inc.*, 501 U. S., at 576, n. 3 (opinion concurring in judgment). If the ordinance regulates conduct (public nudity), it does not do so without regard to whether the nudity is expressive if it exempts the public nudity in Hair *precisely* "because of its expressive content." *Ante*, at 309, n. 6 (opinion concurring in judgment). Moreover, if Erie exempts Hair because it wants to avoid a conflict with the First Amendment (rather than simply to exempt instances of nudity it finds inoffensive), that rationale still does not explain why Hair is exempted but Kandyland is not, since *Barnes* held that both are constitutionally protected.

JUSTICE SCALIA also states that even if the ordinance singled out nude dancing, he would not strike down the law unless the dancing was singled out because of its message. *Ante*, at 310. He opines that here, the basis for singling out Kandyland is morality. *Ibid.* But since the "morality" of the public nudity in Hair is left untouched by the ordinance, while the "immorality" of the public nudity in Kandyland is singled out, the distinction cannot be that "nude public dancing *itself* is immoral." *Ibid.* (emphasis in original). Rather, the only arguable difference between the two is that one's message is more immoral than the other's.

yet there was nudity." *Id.*, at 42. The same lawmaker then disfavorably compared the nude swimming incident to the activities that occur in "some of these clubs" that exist in Erie—clubs that would be covered by the law. *Ibid.*[15] Though such comments could be consistent with an interest in a general prohibition of nudity, the complete absence of commentary on that broader interest, and the councilmembers' exclusive focus on adult entertainment, is evidence of the ordinance's aim. In my view, we need not strain to find consistency with more general purposes when the most natural reading of the record reflects a near obsessive preoccupation with a single target of the law.[16]

The text of Erie's ordinance is also significantly different from the law upheld in *Barnes*. In *Barnes*, the statute defined "nudity" as "the showing of the human male or female genitals" (and certain other regions of the body) "with less than a fully opaque covering." 501 U. S., at 569, n. 2. The Erie ordinance duplicates that definition in all material respects, but adds the following to its definition of "[n]udity":

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[15] Other members said their focus was on "bottle clubs," and the like, App. 43, and attempted to downplay the effect of the ordinance by acknowledging that "the girls can wear thongs or a G-string and little pasties that are smaller than a diamond." *Ibid.* Echoing that focus, another member stated that "[t]here still will be adult entertainment in this town, only it will be in a little different form." *Id.*, at 47.

[16] The plurality dismisses this evidence, declaring that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Ante*, at 292 (citing *United States* v. *O'Brien*, 391 U. S. 367, 382–383 (1968); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 47–48 (1986)). First, it is worth pointing out that this doctrinaire formulation of *O'Brien*'s cautionary statement is overbroad. See generally L. Tribe, American Constitutional Law § 12–5, pp. 819–820 (2d ed. 1988). Moreover, *O'Brien* itself said only that we would not strike down a law "on the *assumption* that a wrongful purpose or motive has caused the power to be exerted," 391 U. S., at 383 (emphasis added; internal quotation marks omitted), and that statement was due to our recognition that it is a "hazardous matter" to determine the actual intent of a body as large as Congress "on the basis of what fewer than a handful of Congressmen said about [a law]," *id.*, at 384. Yet neither consideration is present here. We need not base our inquiry on an "assumption," nor must we infer the collective intent of a large body based on the statements of a few, for we have in the record the actual statements of all the city councilmembers who voted in favor of the ordinance.

> " '[T]he exposure of any device, costume, or covering *which gives the appearance of or simulates* the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, *which device simulates and gives the realistic appearance* of nipples and/or areola.' " *Ante*, at 283–284, n. (emphasis added).

Can it be doubted that this out-of-the-ordinary definition of "nudity" is aimed directly at the dancers in establishments such as Kandyland? Who else is likely to don such garments?[17] We should not stretch to embrace fanciful explanations when the most natural reading of the ordinance unmistakably identifies its intended target.

It is clear beyond a shadow of a doubt that the Erie ordinance was a response to a more specific concern than nudity in general, namely, nude dancing of the sort found in Kandyland.[18] Given that the Court has not even tried to defend the ordinance's total ban on the ground that its censorship of protected speech might be justified by an overriding state interest, it should conclude that the ordinance is patently invalid. For these reasons, as well as the reasons set forth in Justice White's dissent in *Barnes*, I respectfully dissent.

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[17] Is it seriously contended (as would be necessary to sustain the ordinance as a general prohibition) that, when crafting this bizarre definition of "nudity," Erie's concern was with the use of simulated nipple covers on "nude beaches and [by otherwise] unclothed purveyors of hot dogs and machine tools"? *Barnes*, 501 U. S., at 574 (SCALIA, J., concurring in judgment); see also *ante*, at 308 (SCALIA, J., concurring in judgment). It is true that one might *conceivably* imagine that is Erie's aim. But it is far more likely that this novel definition was written with the Kandyland dancers and the like in mind, since they are the only ones covered by the law (recall that plays like Equus are exempted from coverage) who are likely to utilize such unconventional clothing.

[18] The plurality states that Erie's ordinance merely "replaces and updates provisions of an 'Indecency and Immorality' ordinance" from the mid-19th century, just as the statute in *Barnes* did. *Ante*, at 290. First of all, it is not clear that this is correct. The record does indicate that

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Erie's Ordinance No. 75–1994 updates an older ordinance of similar import. Unfortunately, that old regulation is not in the record. Consequently, whether the new ordinance merely "replaces" the old one is a matter of debate. From statements of one councilmember, it can reasonably be inferred that the old ordinance was merely a residential zoning restriction, not a total ban. See App. 43. If that is so, it leads to the further question why Erie felt it necessary to shift to a total ban in 1994.

But even if the plurality's factual contention is correct, it does not undermine the points I have made in the text. In *Barnes*, the point of noting the ancient pedigree of the Indiana statute was to demonstrate that its passage antedated the appearance of adult entertainment venues, and therefore could not have been motivated by the presence of those establishments. The inference supposedly rebutted in *Barnes* stemmed from the *timing* of the enactment. Here, however, the inferences I draw depend on the text of the ordinance, its preamble, its scope and enforcement, and the comments of the councilmembers. These do not depend on the timing of the ordinance's enactment.

# FREE ET AL. *v.* ABBOTT LABORATORIES, INC., ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99–391. Argued March 27, 2000—Decided April 3, 2000

176 F. 3d 298, affirmed by an equally divided Court.

*Daniel A. Small* argued the cause for petitioners. With him on the briefs were *Michael D. Hausfeld, Matthew F. Pawa, Eric L. Olson, Daniel E. Gustafson, Howard J. Sedran,* and *Don Barrett.*

*Frank Cicero, Jr.,* argued the cause for respondents. With him on the brief were *Craig A. Knot, Christopher Landau,* and *Max R. Shulman.*[*]

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

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[*] *Jane Bishop Johnson* filed a brief for the State of Louisiana as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States et al. by *Evan M. Tager, Robin S. Conrad,* and *Donald D. Evans;* for the Product Liability Advisory Council by *John H. Beisner;* and for the Securities Industry Association by *Stuart J. Kaswell.*

# BOND *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98–9349. Argued February 29, 2000—Decided April 17, 2000

Border Patrol Agent Cantu boarded a bus in Texas to check the immigration status of its passengers. As he walked off the bus, he squeezed the soft luggage which passengers had placed in the overhead storage space. He squeezed a canvas bag above petitioner's seat and noticed that it contained a "brick-like" object. After petitioner admitted owning the bag and consented to its search, Agent Cantu discovered a "brick" of methamphetamine. Petitioner was indicted on federal drug charges. He moved to suppress the drugs, arguing that Agent Cantu conducted an illegal search of his bag. The District Court denied the motion and found petitioner guilty. The Fifth Circuit affirmed the denial of the motion, holding that Agent Cantu's manipulation of the bag was not a search under the Fourth Amendment.

*Held:* Agent Cantu's physical manipulation of petitioner's carry-on bag violated the Fourth Amendment's proscription against unreasonable searches. A traveler's personal luggage is clearly an "effect" protected by the Amendment, see *United States* v. *Place*, 462 U. S. 696, 707, and it is undisputed that petitioner possessed a privacy interest in his bag. The Government's assertion that by exposing his bag to the public, petitioner lost a reasonable expectation that his bag would not be physically manipulated is rejected. *California* v. *Ciraolo*, 476 U. S. 207, and *Florida* v. *Riley*, 488 U. S. 445, are distinguishable, because they involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection. Under this Court's Fourth Amendment analysis, a court first asks whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that "he [sought] to preserve [something] as private." *Smith* v. *Maryland*, 442 U. S. 735, 740. Here, petitioner sought to preserve privacy by using an opaque bag and placing it directly above his seat. Second, a court inquires whether the individual's expectation of privacy is "one that society is prepared to recognize as reasonable." *Ibid.* Although a bus passenger clearly expects that other passengers or bus employees may handle his bag, he does not expect that they will feel the bag in an exploratory manner. But this is exactly what the agent did here. Pp. 336–339.

167 F. 3d 225, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 339.

*M. Carolyn Fuentes* argued the cause for petitioner. With her on the briefs were *Lucien B. Campbell* and *Henry J. Bemporad.*

*Jeffrey A. Lamken* argued the cause for the United States. With him on the brief were *Solicitor General Waxman, Assistant Attorney General Robinson,* and *Deputy Solicitor General Dreeben.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether a law enforcement officer's physical manipulation of a bus passenger's carry-on luggage violated the Fourth Amendment's proscription against unreasonable searches. We hold that it did.

Petitioner Steven Dewayne Bond was a passenger on a Greyhound bus that left California bound for Little Rock, Arkansas. The bus stopped, as it was required to do, at the permanent Border Patrol checkpoint in Sierra Blanca, Texas. Border Patrol Agent Cesar Cantu boarded the bus to check the immigration status of its passengers. After reaching the back of the bus, having satisfied himself that the passengers were lawfully in the United States, Agent Cantu began walking toward the front. Along the way, he squeezed the soft luggage which passengers had placed in the overhead storage space above the seats.

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers et al. by *William J. Mertens* and *Barbara Bergman;* and for the Pro Bono Criminal Assistance Project by *David L. Heilberg.*

*Stephen R. McSpadden* filed a brief for the National Association of Police Organizations as *amicus curiae* urging affirmance.

Petitioner was seated four or five rows from the back of the bus. As Agent Cantu inspected the luggage in the compartment above petitioner's seat, he squeezed a green canvas bag and noticed that it contained a "brick-like" object. Petitioner admitted that the bag was his and agreed to allow Agent Cantu to open it.[1] Upon opening the bag, Agent Cantu discovered a "brick" of methamphetamine. The brick had been wrapped in duct tape until it was oval-shaped and then rolled in a pair of pants.

Petitioner was indicted for conspiracy to possess, and possession with intent to distribute, methamphetamine in violation of 84 Stat. 1260, 21 U. S. C. §841(a)(1). He moved to suppress the drugs, arguing that Agent Cantu conducted an illegal search of his bag. Petitioner's motion was denied, and the District Court found him guilty on both counts and sentenced him to 57 months in prison. On appeal, he conceded that other passengers had access to his bag, but contended that Agent Cantu manipulated the bag in a way that other passengers would not. The Court of Appeals rejected this argument, stating that the fact that Agent Cantu's manipulation of petitioner's bag was calculated to detect contraband is irrelevant for Fourth Amendment purposes. 167 F. 3d 225, 227 (CA5 1999) (citing *California* v. *Ciraolo*, 476 U. S. 207 (1986)). Thus, the Court of Appeals affirmed the denial of the motion to suppress, holding that Agent Cantu's manipulation of the bag was not a search within the meaning of the Fourth Amendment. 167 F. 3d, at 227. We granted certiorari, 528 U. S. 927 (1999), and now reverse.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." A traveler's personal luggage is clearly an "effect" protected by the Amendment. See *United States* v.

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[1] The Government has not argued here that petitioner's consent to Agent Cantu's opening the bag is a basis for admitting the evidence.

*Place*, 462 U. S. 696, 707 (1983). Indeed, it is undisputed here that petitioner possessed a privacy interest in his bag.

But the Government asserts that by exposing his bag to the public, petitioner lost a reasonable expectation that his bag would not be physically manipulated. The Government relies on our decisions in *California* v. *Ciraolo, supra,* and *Florida* v. *Riley,* 488 U. S. 445 (1989), for the proposition that matters open to public observation are not protected by the Fourth Amendment. In *Ciraolo,* we held that police observation of a backyard from a plane flying at an altitude of 1,000 feet did not violate a reasonable expectation of privacy. Similarly, in *Riley,* we relied on *Ciraolo* to hold that police observation of a greenhouse in a home's curtilage from a helicopter passing at an altitude of 400 feet did not violate the Fourth Amendment. We reasoned that the property was "not necessarily protected from inspection that involves no physical invasion," and determined that because any member of the public could have lawfully observed the defendants' property by flying overhead, the defendants' expectation of privacy was "not reasonable and not one 'that society is prepared to honor.'" See *Riley, supra,* at 449 (explaining and relying on *Ciraolo*'s reasoning).

But *Ciraolo* and *Riley* are different from this case because they involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection. For example, in *Terry* v. *Ohio,* 392 U. S. 1, 16–17 (1968), we stated that a "careful [tactile] exploration of the outer surfaces of a person's clothing all over his or her body" is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." Although Agent Cantu did not "frisk" petitioner's person, he did conduct a probing tactile examination of petitioner's carry-on luggage. Obviously, petitioner's bag was not part of his person. But travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand.

Here, petitioner concedes that, by placing his bag in the overhead compartment, he could expect that it would be exposed to certain kinds of touching and handling. But petitioner argues that Agent Cantu's physical manipulation of his luggage "far exceeded the casual contact [petitioner] could have expected from other passengers." Brief for Petitioner 18–19. The Government counters that it did not.

Our Fourth Amendment analysis embraces two questions. First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that "he [sought] to preserve [something] as private." *Smith* v. *Maryland,* 442 U. S. 735, 740 (1979) (internal quotation marks omitted). Here, petitioner sought to preserve privacy by using an opaque bag and placing that bag directly above his seat. Second, we inquire whether the individual's expectation of privacy is "one that society is prepared to recognize as reasonable." *Ibid.* (internal quotation marks omitted).[2] When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment.

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[2] The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment. Brief for Petitioner 14; Brief for United States 33–34; see *Whren* v. *United States,* 517 U. S. 806, 813 (1996) (stating that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *California* v. *Ciraolo,* 476 U. S. 207, 212 (1986) (rejecting respondent's challenge to "the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation"). This principle applies to the agent's acts in this case as well; the issue is not his state of mind, but the objective effect of his actions.

The judgment of the Court of Appeals is

*Reversed.*

JUSTICE BREYER, with whom JUSTICE SCALIA joins, dissenting.

Does a traveler who places a soft-sided bag in the shared overhead storage compartment of a bus have a "reasonable expectation" that strangers will not push, pull, prod, squeeze, or otherwise manipulate his luggage? Unlike the majority, I believe that he does not.

Petitioner argues—and the majority points out—that, even if bags in overhead bins are subject to general "touching" and "handling," this case is special because "Agent Cantu's physical manipulation of [petitioner's] luggage 'far exceeded the casual contact [he] could have expected from other passengers.'" *Ante*, at 338. But the record shows the contrary. Agent Cantu testified that border patrol officers (who routinely enter buses at designated checkpoints to run immigration checks) "conduct an inspection of the overhead luggage by squeezing the bags as we're going out." App. 9. On the occasion at issue here, Agent Cantu "felt a green bag" which had "a brick-like object in it." *Id.*, at 10. He explained that he felt "the edges of the brick in the bag," *id.*, at 12, and that it was a "[b]rick-like object . . . that, when squeezed, you could feel an outline of something of [a] different mass inside of it," *id.*, at 11. Although the agent acknowledged that his practice was to "squeeze [bags] very hard," he testified that his touch ordinarily was not "[h]ard enough to break something inside that might be fragile." *Id.*, at 15. Petitioner also testified that Agent Cantu "reached for my bag, and he shook it a little, and squeezed it." *Id.*, at 18.

How does the "squeezing" just described differ from the treatment that overhead luggage is likely to receive from strangers in a world of travel that is somewhat less gentle than it used to be? I think not at all. See *United States* v. *McDonald,* 100 F. 3d 1320, 1327 (CA7 1996) ("'[A]ny person who has travelled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage'"); Eagan, Familiar Anger Takes Flight with Airline Tussles, Boston Herald, Aug. 15, 1999, p. 8 ("It's dog-eat-dog trying to cram half your home into overhead compartments"); Massingill, Airlines Ride on the Wings of High-Flying Economy and Travelers Pay Price in Long Lines, Cramped Airplanes, Kansas City Star, May 9, 1999, p. F4 ("[H]undreds of passengers fill overhead compartments with bulky carry-on bags that they have to cram, recram, and then remove"); Flinn, Confessions of a Once-Only Carry-On Guy, San Francisco Examiner, Sept. 6, 1998, p. T2 (flight attendant "rearranged the contents of three different overhead compartments to free up some room" and then "shoved and pounded until [the] bag squeezed in"). The trial court, which heard the evidence, saw nothing unusual, unforeseeable, or special about this agent's squeeze. It found that Agent Cantu simply "felt the outside of Bond's softside green cloth bag," and it viewed the agent's activity as "minimally intrusive touching." App. 23 (Order Denying Motion to Suppress). The Court of Appeals also noted that, because "passengers often handle and manipulate other passengers' luggage," the substantially similar tactile inspection here was entirely "foreseeable." 167 F. 3d 225, 227 (CA5 1999).

The record and these factual findings are sufficient to resolve this case. The law is clear that the Fourth Amendment protects against government intrusion that upsets an "'actual (subjective) expectation of privacy'" that is objectively "'reasonable.'" *Smith* v. *Maryland,* 442 U. S. 735, 740 (1979) (quoting *Katz* v. *United States,* 389 U. S. 347, 361

(1967) (Harlan, J., concurring)). Privacy itself implies the exclusion of uninvited strangers, not just strangers who work for the Government. Hence, an individual cannot reasonably expect privacy in respect to objects or activities that he "knowingly exposes to the public." *Id.*, at 351.

Indeed, the Court has said that it is not *objectively* reasonable to expect privacy if "[a]ny member of the public . . . could have" used his senses to detect "everything that th[e] officers observed." *California* v. *Ciraolo*, 476 U. S. 207, 213–214 (1986). Thus, it has held that the fact that strangers may look down at fenced-in property from an aircraft or sift through garbage bags on a public street can justify a similar police intrusion. See *ibid.; Florida* v. *Riley*, 488 U. S. 445, 451 (1989) (plurality opinion); *California* v. *Greenwood*, 486 U. S. 35, 40–41 (1988); cf. *Texas* v. *Brown*, 460 U. S. 730, 740 (1983) (police not precluded from " 'ben[ding] down' " to see since "[t]he general public could peer into the interior of [the car] from any number of angles"). The comparative likelihood that strangers will give bags in an overhead compartment a hard squeeze would seem far greater. See *Riley*, *supra*, at 453 (O'CONNOR, J., concurring in judgment) (reasonableness of privacy expectation depends on whether intrusion is a "sufficiently routine part of modern life"). Consider, too, the accepted police practice of using dogs to sniff for drugs hidden inside luggage. See, *e. g.*, *United States* v. *Place*, 462 U. S. 696, 699 (1983). Surely it is less likely that nongovernmental strangers will sniff at another's bags (or, more to the point, permit their dogs to do so) than it is that such actors will touch or squeeze another person's belongings in the process of making room for their own.

Of course, the agent's *purpose* here—searching for drugs—differs dramatically from the intention of a driver or fellow passenger who squeezes a bag in the process of making more room for another parcel. But in determining whether an expectation of privacy is reasonable, it is the *effect*, not the purpose, that matters. See *ante*, at 338, n. 2

("[T]he issue is not [the agent's] state of mind, but the objective effect of his actions"); see also *Whren* v. *United States,* 517 U. S. 806, 813 (1996); *United States* v. *Dunn,* 480 U. S. 294, 304–305 (1987). Few individuals with something to hide wish to expose that something to the police, however careless or indifferent they may be in respect to discovery by other members of the public. Hence, a Fourth Amendment rule that turns on purpose could prevent police alone from intruding where other strangers freely tread. And the added privacy protection achieved by such an approach would not justify the harm worked to law enforcement—at least that is what this Court's previous cases suggest. See *Greenwood, supra,* at 41 ("[T]he police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public"); *Ciraolo, supra,* at 212–213 (rejecting respondent's argument that the police should be restricted solely because their actions are "motivated by a law enforcement purpose, and not the result of a casual, accidental observation").

Nor can I accept the majority's effort to distinguish "tactile" from "visual" interventions, see *ante,* at 337, even assuming that distinction matters here. Whether tactile manipulation (say, of the exterior of luggage) is more intrusive or less intrusive than visual observation (say, through a lighted window) necessarily depends on the particular circumstances.

If we are to depart from established legal principles, we should not begin here. At best, this decision will lead to a constitutional jurisprudence of "squeezes," thereby complicating further already complex Fourth Amendment law, increasing the difficulty of deciding ordinary criminal matters, and hindering the administrative guidance (with its potential for control of unreasonable police practices) that a less complicated jurisprudence might provide. Cf. *Whren, supra,* at 815 (warning against the creation of trivial Fourth Amendment distinctions). At worst, this case will deter law enforcement officers searching for drugs near borders from using even the most nonintrusive touch to help investigate publicly exposed bags. At the same time, the ubiquity of *non*-governmental pushes, prods, and squeezes (delivered by driver, attendant, passenger, or some other stranger) means that this decision cannot do much to protect true privacy. Rather, the traveler who wants to place a bag in a shared overhead bin and yet safeguard its contents from public touch should plan to pack those contents in a suitcase with hard sides, irrespective of the Court's decision today.

For these reasons, I dissent.

# NORFOLK SOUTHERN RAILWAY CO. *v.* SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF SHANKLIN

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99–312. Argued March 1, 2000—Decided April 17, 2000

The Federal Railroad Safety Act of 1970 (FRSA) authorizes the Secretary of Transportation to promulgate regulations and issue orders for railroad safety, and it requires the Secretary to maintain a coordinated effort to solve railroad grade crossing problems. The FRSA also has an express pre-emption provision. One regulation promulgated by the Secretary, through the Federal Highway Administration (FHWA), addresses the adequacy of warning devices installed under the Federal Railway-Highway Crossings Program (Crossings Program). That program provides funds to States for the construction of such devices pursuant to the Highway Safety Act of 1973. According to the regulation, adequate warning devices installed using federal funds, where any of several conditions are present, are automatic gates and flashing lights. 23 CFR § 646.214(b)(3). For crossings where those conditions are not present, a State's decision about what devices to install is subject to FHWA approval. § 646.214(b)(4). Respondent's husband was killed when petitioner's train hit his vehicle at a crossing with advance warning signs and reflectorized crossbucks that the Tennessee Department of Transportation (TDOT) had installed using federal funds under the Crossings Program. The signs were installed and fully compliant with applicable federal standards. Respondent brought a diversity wrongful death action in federal court, alleging that petitioner was negligent in, among other things, failing to maintain adequate warning devices at the crossing. The District Court denied petitioner's summary judgment motion, holding that the FRSA did not pre-empt respondent's inadequate warning device claim. After a trial, the jury awarded respondent damages on this and other negligence issues. The Sixth Circuit affirmed.

*Held:* The FRSA, in conjunction with §§ 646.214(b)(3) and (4), pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the devices' installation. In *CSX Transp., Inc.* v. *Easterwood,* 507 U. S. 658, 670, this Court held that, because §§ 646.214(b)(3) and (4) "establish requirements as to the installation of particular warning devices," "when they are applicable, state tort law is pre-empted." Thus, the sole question here is whether they "are applicable" to all warning devices actually installed with federal funds. *Easterwood* answers this question as well, because it held that the requirements in (b)(3) and (4) are *mandatory* for all such devices. *Id.*, at 666. They establish a standard of adequacy that determines the type of warning device to be installed when federal funds participate in the crossing improvement project. Once the FHWA has approved and funded the improvement and the devices are installed and operating, the regulation displaces state and private decisionmaking authority with a federal-law requirement. Importantly, this is precisely the interpretation of §§ 646.214(b)(3) and (4) that the FHWA endorsed in *Easterwood.* The Government's position here—that (b)(3) and (4) only apply where the warning devices have been selected based on diagnostic studies and particularized analyses of a crossing's conditions—is not entitled to deference, because it contradicts the regulation's plain text as well as the FHWA's own previous construction that the Court adopted as authoritative in *Easterwood.* Respondent's argument that pre-emption does not apply here because this crossing presented several (b)(3) factors, and because the TDOT did not install pavement markings required by the FHWA's Manual on Uniform Traffic Control Devices, misconceives how pre-emption operates under these circumstances. If they are applicable, §§ 646.214(b)(3) and (4) establish a federal standard for adequacy that displaces state tort law addressing the same subject. Whether the State should have originally installed different or additional devices, or whether conditions at the crossing have since changed such that different devices would be appropriate, is immaterial. Nothing prevents a State from revisiting the adequacy of devices installed using federal funds, or from installing more protective devices at such crossings with their own funds or additional FHWA funding, but the State cannot hold the railroad responsible for the adequacy of those devices. Pp. 352–359.

173 F. 3d 386, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Kennedy, Souter, Thomas, and Breyer, JJ., joined. Breyer, J., filed a concurring opinion, *post*, p. 359. Ginsburg, J., filed a dissenting opinion, in which Stevens, J., joined, *post*, p. 360.

*Carter G. Phillips* argued the cause for petitioner. With him on the briefs were *G. Paul Moates, Stephen B. Kinnaird, Everett B. Gibson,* and *Wiley G. Mitchell, Jr.*

*Gregory S. Coleman,* Solicitor General of Texas, argued the cause for the State of Texas et al. as *amici curiae* urging reversal. With him on the brief were *John Cornyn,* Attorney General of Texas, *Andy Taylor,* First Assistant Attorney General, and *Linda E. Eads,* Deputy Attorney General, *Bill Pryor,* Attorney General of Alabama, *D. Michael Fisher,* Attorney General of Pennsylvania, *Charlie Condon,* Attorney General of South Carolina, and *Norman N. Hill.*

*Thomas C. Goldstein* argued the cause for respondent. With him on the briefs were *Pamela R. O'Dwyer* and *Brian Wolfman.*

*Patricia A. Millett* argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Waxman, Acting Assistant Attorney General Ogden, Deputy Solicitor General Kneedler, Douglas N. Letter, Michael E. Robinson, Nancy E. McFadden, Paul M. Geier, Dale C. Andrews, Edward V. A. Kussy,* and *S. Mark Lindsey.**

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*Briefs of *amici curiae* urging reversal were filed for the Association of American Railroads by *Daniel Saphire;* and for the Product Liability Advisory Council, Inc., by *Kenneth S. Geller* and *Charles Rothfeld.*

Briefs of *amici curiae* urging affirmance were filed for the State of North Carolina et al. by *Michael F. Easley,* Attorney General of North Carolina, and *Amy R. Gillespie,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *Ken Salazar* of Colorado, *James E. Ryan* of Illinois, *Carla J. Stovall* of Kansas, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Frankie Sue Del Papa* of Nevada, *Patricia A. Madrid* of New Mexico, *W. A. Drew Edmondson* of Oklahoma, *Sheldon Whitehouse* of Rhode Island, and *Darrell V. McGraw, Jr.,* of West Virginia; for the Angels on Track Foundation et al. by *Robert L. Pottroff;* for the Association of Trial Lawyers of America by *Dale Haralson;* and for the United Transportation Union by *Lawrence M. Mann* and *Clinton Miller III.*

*William C. Hopkins II* and *David V. Scott* filed a brief for Kenneth W. Heathington et al. as *amici curiae.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case involves an action for damages against a railroad due to its alleged failure to maintain adequate warning devices at a grade crossing in western Tennessee. After her husband was killed in a crossing accident, respondent brought suit against petitioner, the operator of the train involved in the collision. Respondent claimed that the warning signs posted at the crossing, which had been installed using federal funds, were insufficient to warn motorists of the danger posed by passing trains. The specific issue we must decide is whether the Federal Railroad Safety Act of 1970, 84 Stat. 971, as amended, 49 U. S. C. §20101 *et seq.*, in conjunction with the Federal Highway Administration's regulation addressing the adequacy of warning devices installed with federal funds, pre-empts state tort actions such as respondent's. We hold that it does.

## I

### A

In 1970, Congress enacted the Federal Railroad Safety Act (FRSA) "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U. S. C. §20101. The FRSA grants the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety," §20103(a), and directs the Secretary to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem," §20134(a). The FRSA also contains an express pre-emption provision, which states:

> "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or

> issues an order covering the subject matter of the State requirement." § 20106.

Although the pre-emption provision contains an exception, see *ibid.*, it is inapplicable here.

Three years after passing the FRSA, Congress enacted the Highway Safety Act of 1973, § 203, 87 Stat. 283, which, among other things, created the Federal Railway-Highway Crossings Program (Crossings Program), see 23 U. S. C. § 130. That program makes funds available to States for the "cost of construction of projects for the elimination of hazards of railway-highway crossings." § 130(a). To participate in the Crossings Program, all States must "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." § 130(d). That schedule must, "[a]t a minimum, . . . provide signs for all railway-highway crossings." *Ibid.*

The Secretary, through the Federal Highway Administration (FHWA), has promulgated several regulations implementing the Crossings Program. One of those regulations, 23 CFR § 646.214(b) (1999), addresses the design of grade crossing improvements. More specifically, §§ 646.214(b)(3) and (4) address the adequacy of warning devices installed under the program.* According to § 646.214(b)(3), "[a]dequate warning devices . . . on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals" if any of several conditions are present. Those conditions include (A) "[m]ultiple main line railroad tracks," (B) multiple tracks in the vicinity such that one train might "obscure the movement of another train approaching the crossing," (C) high speed trains combined with limited sight distances, (D) a "combination of high speeds and moderately high volumes of highway and railroad traffic," (E) the use of the crossing by "substantial numbers of schoolbuses or trucks carrying hazardous materials," or (F) when a "diagnostic team recommends them." § 646.214(b)(3)(i). Subsection (b)(4) states that "[f]or crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." Thus, at crossings where any of the conditions listed in (b)(3) exist, adequate warning devices, if installed using federal funds, are automatic gates and flashing lights. And where the (b)(3) conditions are not present, the decision of what devices to install is subject to FHWA approval.

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*Sections 646.214(b)(3) and (4) provide in full:

"(3)(i) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

"(A) Multiple main line railroad tracks.

"(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

"(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

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"(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

"(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

"(F) A diagnostic team recommends them.

"(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

"(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA."

## B

Shortly after 5 a.m. on October 3, 1993, Eddie Shanklin drove his truck eastward on Oakwood Church Road in Gibson County, Tennessee. App. to Pet. for Cert. 28a. As Shanklin crossed the railroad tracks that intersect the road, he was struck and killed by a train operated by petitioner. *Ibid.* At the time of the accident, the Oakwood Church Road crossing was equipped with advance warning signs and reflectorized crossbucks, *id.*, at 34a, the familiar black-and-white, X-shaped signs that read "RAILROAD CROSSING," see U. S. Dept. of Transportation, Federal Highway Administration, Manual on Uniform Traffic Control Devices § 8B–2 (1988) (MUTCD). The Tennessee Department of Transportation (TDOT) had installed the signs in 1987 with federal funds received under the Crossings Program. App. to Pet. for Cert. 3a. The TDOT had requested the funds as part of a project to install such signs at 196 grade crossings in 11 Tennessee counties. See App. 128–131. That request contained information about each crossing covered by the project, including the presence or absence of several of the factors listed in § 646.214(b)(3). See *id.*, at 134. The FHWA approved the project, App. to Pet. for Cert. 34a, and federal funds accounted for 99% of the cost of installing the signs at the crossings, see App. 133. It is undisputed that the signs at the Oakwood Church Road crossing were installed and fully compliant with the federal standards for such devices at the time of the accident.

Following the accident, Mr. Shanklin's widow, respondent Dedra Shanklin, brought this diversity wrongful death action against petitioner in the United States District Court for the Western District of Tennessee. *Id.*, at 29–34. Respondent's claims were based on Tennessee statutory and common law. *Id.*, at 31–33. She alleged that petitioner had been negligent in several respects, including by failing to maintain adequate warning devices at the crossing. *Ibid.* Petitioner moved for summary judgment on the ground that the FRSA pre-empted respondent's suit. App. to Pet. for Cert. 28a. The District Court held that respondent's allegation that the signs installed at the crossing were inadequate was not pre-empted. *Id.*, at 29a–37a. Respondent thus presented her inadequate warning device claim and three other allegations of negligence to a jury, which found that petitioner and Mr. Shanklin had both been negligent. App. 47. The jury assigned 70% responsibility to petitioner and 30% to Mr. Shanklin, and it assessed damages of $615,379. *Ibid.* The District Court accordingly entered judgment of $430,765.30 for respondent. *Id.*, at 48.

The Court of Appeals for the Sixth Circuit affirmed, holding that the FRSA did not pre-empt respondent's claim that the devices at the crossing were inadequate. 173 F. 3d 386 (1999). It reasoned that federal funding alone is insufficient to trigger pre-emption of state tort actions under the FRSA and §§ 646.214(b)(3) and (4). *Id.*, at 394. Instead, the railroad must establish that § 646.214(b)(3) or (4) was "applied" to the crossing at issue, meaning that the FHWA affirmatively approved the particular devices installed at the crossing as adequate for safety. *Id.*, at 397. The court concluded that, because the TDOT had installed the signs for the purpose of providing "minimum protection" at the Oakwood Church Road crossing, there had been no such individualized determination of adequacy.

We granted certiorari, 528 U. S. 949 (1999), to resolve a conflict among the Courts of Appeals as to whether the FRSA, by virtue of 23 CFR §§ 646.214(b)(3) and (4) (1999), pre-empts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where federal funds have participated in the installation of the devices. Compare *Ingram* v. *CSX Transp., Inc.*, 146 F. 3d 858 (CA11 1998) (holding that federal funding of crossing improvement triggers pre-emption under FRSA); *Armijo* v. *Atchison, Topeka & Santa Fe R. Co.*, 87 F. 3d 1188 (CA10 1996) (same); *Elrod* v. *Burlington Northern R. Co.*, 68 F. 3d 241 (CA8 1995) (same); *Hester* v. *CSX Transp., Inc.*, 61 F. 3d 382 (CA5 1995) (same), cert. denied, 516 U. S. 1093 (1996), with 173 F. 3d 386 (CA6 1999) (case below); *Shots* v. *CSX Transp., Inc.*, 38 F. 3d 304 (CA7 1994) (no pre-emption until representative of Federal Government has determined that devices installed are adequate for safety).

## II

We previously addressed the pre-emptive effect of the FHWA's regulations implementing the Crossings Program in *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658 (1993). In that case, we explained that the language of the FRSA's pre-emption provision dictates that, to pre-empt state law, the federal regulation must "cover" the same subject matter, and not merely "'touch upon' or 'relate to' that subject matter." *Id.*, at 664; see also 49 U. S. C. § 20106. Thus, "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Easterwood*, *supra*, at 664. Applying this standard, we concluded that the regulations contained in 23 CFR pt. 924 (1999), which "establish the general terms of the bargain between the Federal and State Governments" for the Crossings Program, are not pre-emptive. 507 U. S., at 667. We also held that § 646.214(b)(1), which requires that all traffic control devices installed under the program comply with the MUTCD, does not pre-empt state tort actions. *Id.*, at 668–670. The MUTCD "provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between Federal and State Governments and between States and railroads," and hence "disavows any claim to cover the subject matter of that body of law." *Id.*, at 669–670.

With respect to §§ 646.214(b)(3) and (4), however, we reached a different conclusion. Because those regulations "establish requirements as to the installation of particular warning devices," we held that "when they are applicable, state tort law is pre-empted." *Id.*, at 670. Unlike the other regulations, "§§ 646.214(b)(3) and (4) displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Ibid.* As a result, those regulations "effectively set the terms under which railroads are to participate in the improvement of crossings." *Ibid.*

In *Easterwood* itself, we ultimately concluded that the plaintiff's state tort claim was not pre-empted. *Ibid.* As here, the plaintiff brought a wrongful death action alleging that the railroad had not maintained adequate warning devices at a particular grade crossing. *Id.*, at 661. We held that §§ 646.214(b)(3) and (4) were not applicable because the warning devices for which federal funds had been obtained were never actually installed at the crossing where the accident occurred. *Id.*, at 671–673. Nonetheless, we made clear that, when they do apply, §§ 646.214(b)(3) and (4) "cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Id.*, at 671. The sole question in this case, then, is whether §§ 646.214(b)(3) and (4) "are applicable" to all warning devices actually installed with federal funds.

We believe that *Easterwood* answers this question as well. As an original matter, one could plausibly read §§ 646.214(b)(3) and (4) as being purely definitional, establishing a standard for the adequacy of federally funded warning devices but not requiring that all such devices meet that standard. *Easterwood* rejected this approach, however, and held that the requirements spelled out in (b)(3) and (4) are *mandatory* for all warning devices installed with federal funds. "[F]or projects that involve grade crossings . . . in which 'Federal-aid funds participate in the installation of the [warning] devices,' regulations specify warning devices that *must be installed.*" *Id.*, at 666 (emphasis added). Once it is accepted that the regulations are not merely definitional, their scope is plain: They apply to "any project where

Federal-aid funds participate in the installation of the devices." 23 CFR § 646.214(b)(3)(i) (1999).

Sections 646.214(b)(3) and (4) therefore establish a standard of adequacy that "determine[s] the devices to be installed" when federal funds participate in the crossing improvement project. *Easterwood,* 507 U. S., at 671. If a crossing presents those conditions listed in (b)(3), the State must install automatic gates and flashing lights; if the (b)(3) factors are absent, (b)(4) dictates that the decision as to what devices to install is subject to FHWA approval. See *id.,* at 670–671. In either case, § 646.214(b)(3) or (4) "is applicable" and determines the type of warning device that is "adequate" under federal law. As a result, once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating, the regulation "displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Id.,* at 670.

Importantly, this is precisely the interpretation of §§ 646.214(b)(3) and (4) that the FHWA endorsed in *Easterwood.* Appearing as *amicus curiae,* the Government explained that § 646.214(b) "establishes substantive standards for what constitutes adequate safety devices on grade crossing improvement projects financed with federal funds." Brief for United States as *Amicus Curiae* in *CSX Transp., Inc.* v. *Easterwood,* O. T. 1992, Nos. 91–790 and 91–1206, p. 23. As a result, §§ 646.214(b)(3) and (4) "cover the subject matter of adequate safety devices at crossings that have been improved with the use of federal funds." *Ibid.* More specifically, the Government stated that § 646.214(b)

> "requires gate arms in certain circumstances, and requires FHWA approval of the safety devices in all other circumstances. Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that

> more or different crossing devices were necessary at a federally funded crossing is therefore preempted." *Id.*, at 24.

Thus, *Easterwood* adopted the FHWA's own understanding of the application of §§ 646.214(b)(3) and (4), a regulation that the agency had been administering for 17 years.

Respondent and the Government now argue that §§ 646.214(b)(3) and (4) are more limited in scope and only apply where the warning devices have been selected based on diagnostic studies and particularized analyses of the conditions at the crossing. See Brief for Respondent 16, 24; Brief for United States as *Amicus Curiae* 22 (hereinafter Brief for United States). They contend that the Crossings Program actually comprises two distinct programs—the "minimum protection" program and the "priority" or "hazard" program. See Brief for Respondent 1–7; Brief for United States 15–21. Under the "minimum protection" program, they argue, States obtain federal funds merely to equip crossings with advance warning signs and reflectorized crossbucks, the bare minimum required by the MUTCD, without any judgment as to whether the signs are adequate. See Brief for Respondent 5–7, 30–36; Brief for United States 15–21. Under the "priority" or "hazard" program, in contrast, diagnostic teams conduct individualized assessments of particular crossings, and state or FHWA officials make specific judgments about the adequacy of the warning devices using the criteria set out in § 646.214(b)(3). See Brief for Respondent 5–7, 34–35; Brief for United States 18–21. They therefore contend that (b)(3) and (4) only apply to devices installed under the "priority" or "hazard" program, when a diagnostic team has actually applied the decisional process mandated by (b)(3). See Brief for Respondent 16; Brief for United States 18–25. Only then has the regulation prescribed a federal standard for the adequacy of the warning devices that displaces state law covering the same subject.

This construction, however, contradicts the regulation's plain text. Sections 646.214(b)(3) and (4) make no distinction between devices installed for "minimum protection" and those installed under a so-called "priority" or "hazard" program. Nor does their applicability depend on any individualized determination of adequacy by a diagnostic team or an FHWA official. Rather, as the FHWA itself explained in its *Easterwood* brief, §§ 646.214(b)(3) and (4) have a "comprehensive scope." Brief for United States in *CSX Transp., Inc.* v. *Easterwood,* O. T. 1992, Nos. 91–790 and 91–1206, at 12. Section 646.214(b)(3) states that its requirements apply to "*any* project where Federal-aid funds participate in the installation of the devices." 23 CFR § 646.214(b)(3)(i) (1999) (emphasis added). And § 646.214(b)(4) applies to all federally funded crossings that do not meet the criteria specified in (b)(3). Either way, the federal standard for adequacy applies to the crossing improvement and "substantially subsume[s] the subject matter of the relevant state law." *Easterwood,* 507 U. S., at 664.

Thus, contrary to the Government's position here, §§ 646.214(b)(3) and (4) "specify warning devices that must be installed" as a part of all federally funded crossing improvements. *Id.,* at 666. Although generally "an agency's construction of its own regulations is entitled to substantial deference," *Lyng* v. *Payne,* 476 U. S. 926, 939 (1986), no such deference is appropriate here. Not only is the FHWA's interpretation inconsistent with the text of §§ 646.214(b)(3) and (4), see *Robertson* v. *Methow Valley Citizens Council,* 490 U. S. 332, 359 (1989), but it also contradicts the agency's own previous construction that this Court adopted as authoritative in *Easterwood,* cf. *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.,* 497 U. S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis,* and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning").

The dissent contends that, under our holding, state law is pre-empted even though "[n]o authority, federal or state, has found that the signs in place" are "adequate to protect safety." *Post*, at 360 (opinion of GINSBURG, J.). This presupposes that States have not fulfilled their obligation to comply with §§ 646.214(b)(3) and (4). Those subsections establish a standard for adequacy that States are required to follow in determining what devices to install when federal funds are used. The dissent also argues that *Easterwood* did not hold that federal funding of the devices is "sufficient" to effect pre-emption, and that "any statement as to the automatic preemptive effect of federal funding should have remained open for reconsideration in a later case." *Post*, at 361. But *Easterwood* did not, in fact, leave this question open. Instead, at the behest of the FHWA, the Court clearly stated that §§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of *all* warning devices installed with the participation of federal funds.

Respondent also argues that pre-emption does not lie in this particular case because the Oakwood Church Road crossing presented several of the factors listed in § 646.214(b)(3), and because the TDOT did not install pavement markings as required by the MUTCD. See Brief for Respondent 20–22, 36; Brief in Opposition 6–8. This misconceives how pre-emption operates under these circumstances. When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates "the devices to be installed and the means by which railroads are to participate in their selection." *Easterwood*, *supra*, at 671. It is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to the standard set out in §§ 646.214(b)(3) and (4) or to the requirements of the

MUTCD, that pre-empts state tort actions. Whether the State should have originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question.

It should be noted that nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA. What States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices. The dissent objects that this bestows on railroads a "double windfall": The Federal Government pays for the installation of the devices, and the railroad is simultaneously absolved of state tort liability. *Post*, at 360–361. But the same is true of the result urged by respondent and the Government. Respondent and the Government acknowledge that §§ 646.214(b)(3) and (4) can pre-empt state tort law, but they argue that pre-emption only occurs when the State has installed the devices pursuant to a diagnostic team's analysis of the crossing in question. Under this reading, railroads would receive the same "double windfall"—federal funding of the devices and pre-emption of state tort law—so long as a diagnostic team has evaluated the crossing. The supposed conferral of a "windfall" on the railroads therefore casts no doubt on our construction of the regulation.

Sections 646.214(b)(3) and (4) "cover the subject matter" of the adequacy of warning devices installed with the participation of federal funds. As a result, the FRSA pre-empts respondent's state tort claim that the advance warning signs and reflectorized crossbucks installed at the Oakwood Church Road crossing were inadequate. Because the TDOT used federal funds for the signs' installation, §§ 646.214(b)(3) and (4) governed the selection and installation of the devices. And because the TDOT determined that warning devices other than automatic gates and flashing lights were appropriate, its decision was subject to the approval of the FHWA. See § 646.214(b)(4). Once the FHWA approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby preempting respondent's claim.

The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BREYER, concurring.

I agree with JUSTICE GINSBURG that "common sense and sound policy" suggest that federal *minimum* safety standards should not pre-empt a state tort action claiming that in the particular circumstance a railroad's warning device remains inadequate. *Post*, at 360 (dissenting opinion). But the Federal Government has the legal power to do more. And, as the majority points out, *ante*, at 353–356, the specific Federal Highway Administration regulations at issue here do, in fact, do more—when read in light of *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658 (1993), which faithfully replicates the Government's own earlier interpretation. So read, they say that once federal funds are requested and spent to install warning devices at a grade crossing, the regulations' standards of adequacy apply across the board and pre-empt state law seeking to impose an independent duty on a railroad with respect to the adequacy of warning devices installed. *Id.*, at 671; *ante*, at 357. I see no need here to reconsider the relevant language in this Court's earlier opinion because the Government itself can easily avoid the pre-emption that it previously sought. It can simply change the relevant regulations, for example, by specifying that federal money is sometimes used for "minimum," not "adequate," programs, which minimum programs lack pre-emptive force. The agency remains free to amend its regulations to achieve the commonsense result that the Government itself now seeks. With that understanding, I join the majority's opinion.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

A fatal accident occurred on October 3, 1993, at a railroad crossing in Gibson County, Tennessee. The crossing was equipped not with automatic gates or flashing lights, but only with basic warning signs installed with federal funds provided under the Federal Railway-Highway Crossings Program. See 23 U. S. C. § 130. This federal program aimed to ensure that States would, "[a]t a minimum, . . . provide signs for all railway-highway crossings." § 130(d). No authority, federal or state, has found that the signs in place at the scene of the Gibson County accident were adequate to protect safety, as distinguished from being a bare minimum. Nevertheless, the Court today holds that wholesale federal funding of improvements at 196 crossings throughout 11 west Tennessee counties preempts all state regulation of safety devices at each individual crossing. As a result, respondent Dedra Shanklin cannot recover under state tort law for the railroad's failure to install adequate devices. And the State of Tennessee, because it used federal money to provide at least minimum protection, is stopped from requiring the installation of adequate devices at any of the funded crossings.

The upshot of the Court's decision is that state negligence law is displaced with no substantive federal standard of conduct to fill the void. That outcome defies common sense and sound policy. Federal regulations already provide that railroads shall not be required to pay any share of the cost of federally financed grade crossing improvements. 23 CFR § 646.210(b)(1) (1999). Today the railroads have achieved a double windfall: the Federal Government foots the bill for installing safety devices; and that same federal expenditure spares the railroads from tort liability, even for the inadequacy of devices designed only to secure the "minimum" protection Congress envisioned for all crossings. See 23 U. S. C. § 130(d). Counsel for petitioner Norfolk Southern Railway correctly conceded at oral argument that the relevant statutes do not compel releasing the railroads when the devices installed, though meeting federal standards for "minimum" protection, see *ante*, at 350, fail to provide adequate protection. The road is open for the Secretary of Transportation to enact regulations clarifying that point. See *ante*, at 359–360 (BREYER, J., concurring).

As persuasively explained by the Court of Appeals for the Seventh Circuit in *Shots* v. *CSX Transp., Inc.*, 38 F. 3d 304 (1994) (Posner, C. J.), and reiterated by the Court of Appeals for the Sixth Circuit in the instant case, 173 F. 3d 386 (1999), our prior decision in *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658 (1993), does not necessitate the ouster of state law the Court now commands. *Easterwood*, in which the tort claimant prevailed, dispositively held only that federal funding was necessary to trigger preemption, not that it was sufficient by itself to do so. Because federal funds did not in fact subsidize the crossing at issue in that case, *id.*, at 671–673, any statement as to the automatic preemptive effect of federal funding should have remained open for reconsideration in a later case where federal funds did participate. I do not read the admittedly unclear language of 23 CFR §§ 646.214(b)(3) and (4) (1999) to dictate that Federal Highway Administration authorization of federal funding to install devices is tantamount to approval of each of those devices as adequate to protect safety at every crossing so funded. And I do not think a previous administration's argument to that effect as *amicus curiae* in *Easterwood* estops the Government from taking a different view now. I agree with the sound reasoning in *Shots* and would affirm the Court of Appeals' judgment.

# WILLIAMS *v.* TAYLOR, WARDEN

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98–8384. Argued October 4, 1999—Decided April 18, 2000

A Virginia jury convicted petitioner Williams of robbery and capital murder, and, after a sentencing hearing, found a probability of future dangerousness and unanimously fixed his punishment at death. Concluding that such punishment was "proper" and "just," the trial judge imposed the death sentence. The Virginia Supreme Court affirmed. In state habeas corpus proceedings, the same trial judge found, on the evidence adduced after hearings, that Williams' conviction was valid, but that his counsel's failure to discover and present significant mitigating evidence violated his right to the effective assistance of counsel under *Strickland* v. *Washington*, 466 U. S. 668. In rejecting the trial judge's recommendation that Williams be resentenced, the State Supreme Court held, *inter alia*, that the trial judge had failed to recognize that *Strickland* had been modified by *Lockhart* v. *Fretwell*, 506 U. S. 364, 369, and that Williams had not suffered sufficient prejudice to warrant relief. In habeas corpus proceedings under 28 U. S. C. § 2254, the federal trial judge agreed with the state trial judge that the death sentence was constitutionally infirm on ineffective-assistance grounds. The federal judge identified five categories of mitigating evidence that counsel had failed to introduce and rejected the argument that such failure had been a strategic decision to rely primarily on the fact that Williams had confessed voluntarily. As to prejudice, the judge determined, among other things, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, see *Strickland*, 466 U. S., at 694. Applying an amended version of § 2254(d)(1) enacted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the judge concluded that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Fourth Circuit reversed, construing § 2254(d)(1) to prohibit federal habeas relief unless the state court had interpreted or applied the relevant precedent in a manner that reasonable jurists would all agree is unreasonable. The court declared that it could not say that the Virginia Supreme Court's decision on prejudice was an unreasonable application of the *Strickland* or *Lockhart* standards established by the Supreme Court.

*Held:* The judgment is reversed, and the case is remanded.

163 F. 3d 860, reversed and remanded.

JUSTICE STEVENS delivered the opinion of the Court as to Parts I, III, and IV, concluding that Williams was denied his constitutionally guaranteed right to the effective assistance of counsel, as defined in *Strickland*, when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury. Pp. 390–398.

(a) The threshold question under AEDPA—whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final—is easily answered because the merits of his claim are squarely governed by *Strickland*. To establish ineffective assistance of counsel, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness, 466 U. S., at 688; and (2) that the deficient performance prejudiced the defense, which requires a showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, *id.*, at 694. Because the *Strickland* test qualifies as "clearly established Federal law, as determined by the Supreme Court," this Court's precedent "dictated" that the Virginia Supreme Court apply that test in entertaining Williams' ineffective-assistance claim. See *Teague* v. *Lane*, 489 U. S. 288, 301. Pp. 390–391.

(b) Williams is entitled to relief because the Virginia Supreme Court's decision rejecting his ineffective-assistance claim both is "contrary to, [and] involved an unreasonable application of, clearly established Federal law." *Strickland* provides sufficient guidance for resolving virtually all ineffective-assistance claims, and the Virginia Supreme Court erred in holding that *Lockhart* modified or in some way supplanted *Strickland*. Although there are a few situations in which the overriding focus on fundamental fairness may affect the analysis, see *Strickland*, 466 U. S., at 692, cases such as *Lockhart* and *Nix* v. *Whiteside*, 475 U. S. 157, do not justify a departure from a straightforward application of *Strickland* when counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him. Here, Williams had a constitutionally protected right to provide mitigating evidence that his trial counsel either failed to discover or failed to offer. Moreover, the Virginia trial judge correctly applied both components of the *Strickland* standard to Williams' claim. The record establishes that counsel failed to prepare for sentencing until a week beforehand, to uncover extensive records graphically describing Williams' nightmarish childhood, to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade, to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, and to discover the testimony of prison officials who described Williams as among the inmates least likely to act violently, dangerously, or provocatively, and of a prison minister that Williams seemed to thrive in a more regimented environment. Although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background. Moreover, counsel's unprofessional service prejudiced Williams within *Strickland's* meaning. The Virginia Supreme Court's prejudice analysis was unreasonable in at least two respects: (1) It was not only "contrary to," but also—inasmuch as it relied on the inapplicable *Lockhart* exception—an "unreasonable application of," the clear law as established in *Strickland;* and (2) it failed to evaluate the totality of, and to accord appropriate weight to, the available mitigation evidence. Pp. 391–398.

JUSTICE O'CONNOR delivered the opinion of the Court as to Part II (except as to the footnote), concluding that § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant relief to a state prisoner with respect to claims adjudicated on the merits in state court: The habeas writ may issue only if the state-court adjudication (1) "was contrary to," or (2) "involved an unreasonable application of . . ." clearly established Federal law, as determined by the Supreme Court of the United States." Pp. 402–413.

(a) Because Williams filed his petition in 1997, his case is not governed by the pre-1996 version of the federal habeas statute, but by the statute as amended by AEDPA. Accordingly, for Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the previously settled rule of independent federal review of state prisoners' habeas petitions in order to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. In light of the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute, this Court must give independent meaning to both the "contrary to" and "unreasonable application" clauses of § 2254(d)(1). Given the commonly understood definitions of "contrary" as "diametrically different," "opposite in character or nature," or "mutually opposed," § 2254(d)(1)'s first clause must be interpreted to mean that a federal habeas court may grant relief if the state court (1) arrives at a conclusion opposite to that reached by this Court on a question of law or (2) decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Pp. 402–409.

(b) In defining what qualifies as an "unreasonable application of . . . clearly established Federal law," the Fourth Circuit erred in holding that a state-court decision involves such an application only if the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable. That standard would tend to mislead federal habeas courts by focusing on a subjective inquiry. Rather, the federal court should ask whether the state court's application of clearly established federal law was objectively unreasonable. Cf. *Wright* v. *West*, 505 U. S. 277, 304. Although difficult to define, "unreasonable" is a common legal term familiar to federal judges. For present purposes, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. See, *e. g.*, *id.*, at 305. Because Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect," a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable. Finally, the phrase "clearly established Federal law, as determined by [this] Court" refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. In this respect, the quoted phrase bears only a slight connection to this Court's jurisprudence under *Teague* v. *Lane*, 489 U. S. 288. Whatever would qualify as an "old rule" under *Teague* will constitute "clearly established Federal law, as determined by [this] Court," see, *e. g.*, *Stringer* v. *Black*, 503 U. S. 222, 228, but with one caveat: Section 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence. Pp. 409–413.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts II and V, in which SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., delivered the opinion of the Court with respect to Part II (except as to the footnote), in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, and in which SCALIA, J., joined, except as to the footnote, and an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined, *post,* p. 399. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined, *post,* p. 416.

*John J. Gibbons* argued the cause for petitioner. With him on the briefs were *Brian A. Powers,* by appointment of the Court, 526 U. S. 1110, and *Ellen O. Boardman.*

*Robert Q. Harris,* Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief was *Mark L. Earley,* Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Philip S. Anderson, Abe Krash, Kathleen A. Behan,* and *John A. Freedman;* for the American Civil Liberties Union by *Larry W. Yackle* and *Steven R. Shapiro;* for the National Association of Criminal Defense Lawyers by *John D. Cline* and *Lisa B. Kemler;* for the Virginia College of Criminal Defense Attorneys et al. by *Gerald T. Zerkin;* for Professors Lance G. Banning et al. by *Barry Levenstam* and *Jeffrey T. Shaw;* and for Marvin E. Frankel et al. by *Abner J. Mikva.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *David Druliner,* Chief Assistant Attorney General, *Dane R. Gillette,* Senior Assistant Attorney General, and *Donald E. De Nicola* and *Ward A. Campbell,* Deputy Attorneys General, joined by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Mark Pryor* of Arkansas, *Ken Salazar* of Colorado, *John M. Bailey* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Carla Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael C. Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *John J. Farmer, Jr.,* of New Jersey, *Patricia A. Madrid* of New Mexico, *Michael E. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Jan Graham* of Utah, *Christine O. Gregoire* of Washington, and *Darrell McGraw, Jr.,* of West Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Parts II and V.*

The questions presented are whether Terry Williams' constitutional right to the effective assistance of counsel as defined in *Strickland* v. *Washington*, 466 U. S. 668 (1984), was violated, and whether the judgment of the Virginia Supreme Court refusing to set aside his death sentence "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III). We answer both questions affirmatively.

## I

On November 3, 1985, Harris Stone was found dead in his residence on Henry Street in Danville, Virginia. Finding no indication of a struggle, local officials determined that the cause of death was blood alcohol poisoning, and the case was considered closed. Six months after Stone's death, Terry Williams, who was then incarcerated in the "I" unit of the city jail for an unrelated offense, wrote a letter to the police stating that he had killed " 'that man down on Henry Street' " and also stating that he " 'did it' " to that " 'lady down on West Green Street' " and was " 'very sorry.' " The letter was unsigned, but it closed with a reference to "I cell." App. 41. The police readily identified Williams as its author, and, on April 25, 1986, they obtained several statements from him. In one Williams admitted that, after Stone refused to lend him " 'a couple of dollars,' " he had killed Stone with a mattock and taken the money from his wallet.[1] *Id.*, at 4. In September 1986, Williams was convicted of robbery and capital murder.

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*JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join this opinion in its entirety. JUSTICE O'CONNOR and JUSTICE KENNEDY join Parts I, III, and IV of this opinion.

At Williams' sentencing hearing, the prosecution proved that Williams had been convicted of armed robbery in 1976 and burglary and grand larceny in 1982. The prosecution also introduced the written confessions that Williams had made in April. The prosecution described two auto thefts and two separate violent assaults on elderly victims perpetrated after the Stone murder. On December 4, 1985, Williams had started a fire outside one victim's residence before attacking and robbing him. On March 5, 1986, Williams had brutally assaulted an elderly woman on West Green Street—an incident he had mentioned in his letter to the police. That confession was particularly damaging because other evidence established that the woman was in a "vegetative state" and not expected to recover. *Id.*, at 60. Williams had also been convicted of arson for setting a fire in the jail while awaiting trial in this case. Two expert witnesses employed by the State testified that there was a "high probability" that Williams would pose a serious continuing threat to society. *Id.*, at 89.

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[1] "'I had gone to Dee Dee Stone's house on Henry Street, Dee Dee's father was there. No one else was there except him. He had been drinking a lot. He was on the bed. He asked me if I wanted a drink. I told him, 'No.' I asked him if I could borrow a couple of dollars and he told me, 'No.' We started arguing and things started going around in my head. I just wanted to get back at him. I don't know what. He just laid back like he had passed out. He was laying there talking and moaning to himself. I went into the kitchen. I saw the butcher knife. I didn't want to use it. I was looking for something to use. I went into the bathroom and I saw the mattock. I picked up the mattock and I came back into the room where he was at. He was laying on the bed. He was laying on his back. I took the mattock and I hit him on the chest with it. He raised up and was gasping for his breath. He fell over to his side and I hit him in the back with the mattock. He fell back on the bed. I went and put the mattock back in the bathroom. I came back into the room. I took his wallet from his pocket. He had three dollars in it. I got the three dollars from it. I left him there. He was still grasping for breath.'" App. 4–5.

The evidence offered by Williams' trial counsel at the sentencing hearing consisted of the testimony of Williams' mother, two neighbors, and a taped excerpt from a statement by a psychiatrist. One of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot. The three witnesses briefly described Williams as a "nice boy" and not a violent person. *Id.*, at 124. The recorded psychiatrist's testimony did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.

In his cross-examination of the prosecution witnesses, Williams' counsel repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of the recent assaults, as well as the car thefts. In closing argument, Williams' counsel characterized Williams' confessional statements as "dumb," but asked the jury to give weight to the fact that he had "turned himself in, not on one crime but on four . . . that the [police otherwise] would not have solved." *Id.*, at 140. The weight of defense counsel's closing, however, was devoted to explaining that it was difficult to find a reason why the jury should spare Williams' life.[2]

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[2] In defense counsel's words: "I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself. I doubt very seriously that he thought much about mercy when he was in Mr. Stone's bedroom that night with him. I doubt very seriously that he had mercy very highly on his mind when he was walking along West Green and the incident with Alberta Stroud. I doubt very seriously that he had mercy on his mind when he took two cars that didn't belong to him. Admittedly it is very difficult to get us and ask that you give this man mercy when he has shown so little of it himself. But I would ask that you would." *Id.*, at 132–133.

The jury found a probability of future dangerousness and unanimously fixed Williams' punishment at death. The trial judge concluded that such punishment was "proper" and "just" and imposed the death sentence. *Id.*, at 154. The Virginia Supreme Court affirmed the conviction and sentence. *Williams* v. *Commonwealth*, 234 Va. 168, 360 S. E. 2d 361 (1987), cert. denied, *Williams* v. *Virginia*, 484 U. S. 1020 (1988). It rejected Williams' argument that when the trial judge imposed sentence, he failed to give mitigating weight to the fact that Williams had turned himself in. 234 Va., at 181–182, 360 S. E. 2d, at 369–370.

*State Habeas Corpus Proceedings*

In 1988 Williams filed for state collateral relief in the Danville Circuit Court. The petition was subsequently amended, and the Circuit Court (the same judge who had presided over Williams' trial and sentencing) held an evidentiary hearing on Williams' claim that trial counsel had been ineffective.[3] Based on the evidence adduced after two days of hearings, Judge Ingram found that Williams' conviction was valid, but that his trial attorneys had been ineffective during sentencing. Among the evidence reviewed that had not been presented at trial were documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was "borderline mentally retarded," had suffered repeated head injuries, and might have mental impairments organic in origin. App. 528–529, 595. The habeas hearing also revealed that the same experts who had testified on the State's behalf at trial believed that Williams, if kept in a "structured environment," would not pose a future danger to society. *Id.*, at 313–314.

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[3] While Williams' petition was pending before the Circuit Court, Virginia amended its state habeas statute to vest in the State Supreme Court exclusive jurisdiction to award writs of habeas corpus in capital cases. Va. Code Ann. § 8.01–654(C)(1) (Supp. 1999). Shortly after the Circuit Court held its evidentiary hearing, the Supreme Court assumed jurisdiction over Williams' petition and instructed the Circuit Court to issue findings of fact and legal recommendation regarding Williams' ineffective-assistance claims.

Counsel's failure to discover and present this and other significant mitigating evidence was "below the range expected of reasonable, professional competent assistance of counsel." *Id.*, at 424. Counsel's performance thus "did not measure up to the standard required under the holding of *Strickland v. Washington*, 466 U. S. 668 (1984), and [if it had,] there is a reasonable probability that the result of the sentencing phase would have been different." *Id.*, at 429. Judge Ingram therefore recommended that Williams be granted a rehearing on the sentencing phase of his trial.

The Virginia Supreme Court did not accept that recommendation. *Williams* v. *Warden*, 254 Va. 16, 487 S. E. 2d 194 (1997). Although it assumed, without deciding, that trial counsel had been ineffective, *id.*, at 23–26, 487 S. E. 2d, at 198, 200, it disagreed with the trial judge's conclusion that Williams had suffered sufficient prejudice to warrant relief. Treating the prejudice inquiry as a mixed question of law and fact, the Virginia Supreme Court accepted the factual determination that available evidence in mitigation had not been presented at the trial, but held that the trial judge had misapplied the law in two respects. First, relying on our decision in *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), the court held that it was wrong for the trial judge to rely "'on mere outcome determination'" when assessing prejudice, 254 Va., at 23, 487 S. E. 2d, at 198 (quoting *Lockhart*, 506 U. S., at 369). Second, it construed the trial judge's opinion as having "adopted a *per se* approach" that would establish prejudice whenever any mitigating evidence was omitted. 254 Va., at 26, 487 S. E. 2d, at 200.

The court then reviewed the prosecution evidence supporting the "future dangerousness" aggravating circumstance, reciting Williams' criminal history, including the several most recent offenses to which he had confessed. In comparison, it found that the excluded mitigating evidence—which it characterized as merely indicating "that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment," *ibid.*—"barely would have altered the profile of this defendant that was presented to the jury," *ibid.* On this basis, the court concluded that there was no reasonable possibility that the omitted evidence would have affected the jury's sentencing recommendation, and that Williams had failed to demonstrate that his sentencing proceeding was fundamentally unfair.

### *Federal Habeas Corpus Proceedings*

Having exhausted his state remedies, Williams sought a federal writ of habeas corpus pursuant to 28 U. S. C. § 2254 (1994 ed. and Supp. III). After reviewing the state habeas hearing transcript and the state courts' findings of fact and conclusions of law, the federal trial judge agreed with the Virginia trial judge: The death sentence was constitutionally infirm.

After noting that the Virginia Supreme Court had not addressed the question whether trial counsel's performance at the sentencing hearing fell below the range of competence demanded of lawyers in criminal cases, the judge began by addressing that issue in detail. He identified five categories of mitigating evidence that counsel had failed to introduce,[4] and he rejected the argument that counsel's failure to conduct an adequate investigation had been a strategic decision to rely almost entirely on the fact that Williams had voluntarily confessed.

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[4] "(i) Counsel did not introduce evidence of the Petitioner's background. . . . (ii) Counsel did not introduce evidence that Petitioner was abused by his father. (iii) Counsel did not introduce testimony from correctional officers who were willing to testify that defendant would not pose a danger while incarcerated. Nor did counsel offer prison commendations awarded to Williams for his help in breaking up a prison drug ring and for returning a guard's missing wallet. (iv) Several character witnesses were not called to testify. . . . [T]he testimony of Elliott, a respected CPA in the community, could have been quite important to the jury . . . . (v) Finally, counsel did not introduce evidence that Petitioner

According to Williams' trial counsel's testimony before the state habeas court, counsel did not fail to seek Williams' juvenile and social services records because he thought they would be counterproductive, but because counsel erroneously believed that "'state law didn't permit it.'" App. 470. Counsel also acknowledged in the course of the hearings that information about Williams' childhood would have been important in mitigation. And counsel's failure to contact a potentially persuasive character witness was likewise not a conscious strategic choice, but simply a failure to return that witness' phone call offering his service. *Id.*, at 470–471. Finally, even if counsel neglected to conduct such an investigation at the time as part of a tactical decision, the District Judge found, tactics as a matter of reasonable performance could not justify the omissions.

Turning to the prejudice issue, the judge determined that there was "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland,* 466 U. S. at 694." *Id.*, at 473. He found that the Virginia Supreme Court had erroneously assumed that *Lockhart* had modified the *Strickland* standard for determining prejudice, and that it had made an important error of fact in discussing its finding of no prejudice.[5] Having introduced his analysis of Williams' claim

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was borderline mentally retarded, though he was found competent to stand trial." App. 465–469.

[5] "Specifically, the Virginia Supreme Court found no prejudice, reasoning: 'The mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury. At most, this evidence would have shown that numerous people, mostly relatives, thought that defendant was nonviolent and could cope very well in a structured environment.' *Williams,* 487 S. E. 2d at 200. The Virginia Su-

with the standard of review applicable on habeas appeals provided by 28 U. S. C. § 2254(d) (1994 ed., Supp. III), the judge concluded that those errors established that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" within the meaning of § 2254(d)(1).

The Federal Court of Appeals reversed. 163 F. 3d 860 (CA4 1998). It construed § 2254(d)(1) as prohibiting the grant of habeas corpus relief unless the state court " 'decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.' " *Id.*, at 865 (quoting *Green* v. *French*, 143 F. 3d 865, 870 (CA4 1998)). Applying that standard, it could not say that the Virginia Supreme Court's decision on the prejudice issue was an unreasonable application of the tests developed in either *Strickland* or *Lockhart*.[6] It explained that the evidence that Williams presented a future danger to society was "simply overwhelming," 163 F. 3d, at 868, it endorsed the Virginia Supreme Court's interpretation of *Lockhart*, 163 F. 3d, at 869, and it characterized the state court's understanding of the facts in this case as "reasonable," *id.*, at 870.

We granted certiorari, 526 U. S. 1050 (1999), and now reverse.

## II

In 1867, Congress enacted a statute providing that federal courts "shall have power to grant writs of habeas corpus in

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preme Court ignored or overlooked the evidence of Williams' difficult childhood and abuse and his limited mental capacity. It is also unreasonable to characterize the additional evidence as coming from 'mostly relatives.' As stated, *supra*, Bruce Elliott, a respected professional in the community, and several correctional officers offered to testify on Williams behalf." *Id.*, at 476.

[6] Like the Virginia Supreme Court, the Court of Appeals assumed, without deciding, that the performance of trial counsel fell below an objective standard of reasonableness. 163 F. 3d, at 867.

all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Over the years, the federal habeas corpus statute has been repeatedly amended, but the scope of that jurisdictional grant remains the same.[7] It is, of course, well settled that the fact that constitutional error occurred in the proceedings that led to a state-court conviction may not alone be sufficient reason for concluding that a prisoner is entitled to the remedy of habeas. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465 (1976); *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993). On the other hand, errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ. See, *e. g.*, *Teague* v. *Lane*, 489 U. S. 288, 311–314 (1989) (quoting *Mackey* v. *United States*, 401 U. S. 667, 692–694 (1971) (Harlan, J., concurring in judgments in part and dissenting in part), and quoting *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting)). The deprivation of the right to the effective assistance of counsel recognized in *Strickland* is such an error. *Strickland*, 466 U. S., at 686, 697–698.

The warden here contends that federal habeas corpus relief is prohibited by the amendment to 28 U. S. C. § 2254 (1994 ed., Supp. III), enacted as a part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The relevant portion of that amendment provides:

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[7] By Act of Congress: "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . . (c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U. S. C. § 2241(c)(3). In parallel, § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."

In this case, the Court of Appeals applied the construction of the amendment that it had adopted in its earlier opinion in *Green* v. *French*, 143 F. 3d 865 (CA4 1998). It read the amendment as prohibiting federal courts from issuing the writ unless:

> "(a) the state court decision is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, 'the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts,'" 163 F. 3d, at 865 (quoting *Green*, 143 F. 3d, at 870).

Accordingly, it held that a federal court may issue habeas relief only if "'the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable,'" 163 F. 3d, at 865.[8]

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[8] The warden's view is narrower. He argues that 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III) establishes a new general rule that prohibits federal courts from granting habeas corpus relief on the basis of any claim that a state court has adjudicated on the merits, and that § 2254(d)(1) merely identifies two narrow exceptions to the general rule—when a state court has issued a decision "contrary to" or an "unreasonable application of"

We are convinced that that interpretation of the amendment is incorrect. It would impose a test for determining when a legal rule is clearly established that simply cannot be squared with the real practice of decisional law.[9] It would apply a standard for determining the "reasonableness" of state-court decisions that is not contained in the statute itself, and that Congress surely did not intend. And it would wrongly require the federal courts, including this Court, to defer to state judges' interpretations of federal law.

As the Fourth Circuit would have it, a state-court judgment is "unreasonable" in the face of federal law only if all reasonable jurists would agree that the state court was unreasonable. Thus, in this case, for example, even if the Virginia Supreme Court misread our opinion in *Lockhart*, we could not grant relief unless we believed that none of the judges who agreed with the state court's interpretation of that case was a "reasonable jurist." But the statute says

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clearly established federal law. Brief for Respondent 14–15. The first, "contrary to" exception, in his view, applies only to "starkly unreasonable" errors of law. The first category thus imposes "a standard of review far more limited than 'de novo,' 'independent' or 'plenary' review." *Id.*, at 24. The state-court judgment must thus be so far afield "as to make the 'unlawfulness' of the state court decision 'apparent.'" *Id.*, at 25. The second exception likewise replaces the "de novo" standard of reviewing mixed questions of law and fact with the standard of "objective reasonableness" as formulated by the Court of Appeals. *Id.*, at 30–31.

[9] Although we explain our understanding of "clearly established law," *infra*, at 379–384, we note that the Fourth Circuit's construction of the amendment's inquiry in this respect is especially problematic. It separates cases into those for which a "controlling decision" exists and those for which no such decision exists. The former category includes very few cases, since a rule is "controlling" only if it matches the case before the court both "as to law and fact," and most cases are factually distinguishable in some respect. A literal application of the Fourth Circuit test would yield a particularly perverse outcome in cases involving the *Strickland* rule for establishing ineffective assistance of counsel, since that case, which established the "controlling" rule of law on the issue, contained facts insufficient to show ineffectiveness.

nothing about "reasonable judges," presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as "unreasonable." Indeed, it is most unlikely that Congress would deliberately impose such a requirement of unanimity on federal judges. As Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.

The inquiry mandated by the amendment relates to the way in which a federal habeas court exercises its duty to decide constitutional questions; the amendment does not alter the underlying grant of jurisdiction in § 2254(a), see n. 7, *supra.*[10] When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.

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[10] Indeed, Congress roundly rejected an amendment to the bill eventually adopted that directly invoked the text of the jurisdictional grant, 28 U. S. C. § 2254(a) (providing that the federal courts "*shall entertain* an application for a writ of habeas corpus" (emphasis added)). The amendment read: "Notwithstanding any other provision of law, an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment or order of a State court *shall not be entertained* by a court of the United States unless the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention." 141 Cong. Rec. 14991 (1995) (amendment of Sen. Kyl) (emphasis added). In speaking against the Kyl amendment, Senator Specter (a key proponent of the eventual habeas reform) explained that when "dealing with the question of jurisdiction of the Federal courts to entertain questions on Federal issues, on constitutional issues, I believe it is necessary that the Federal courts retain that jurisdiction as a constitutional matter." *Id.*, at 15050.

This basic premise informs our interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law. We address each part in turn.

### *The "clearly established law" requirement*

In *Teague* v. *Lane*, 489 U. S. 288 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying on a rule of federal law that had not been announced until after his state conviction became final. The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague*—which remains the law—and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind.[11] It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.[12]

*Teague*'s core principles are therefore relevant to our construction of this requirement. Justice Harlan recognized the "inevitable difficulties" that come with "attempting 'to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.'" *Mackey*, 401 U. S., at 695 (quoting *Desist* v. *United States*, 394 U. S. 244, 263 (1969)). But *Teague* established some guidance for making this determination, explaining that a federal habeas court operates within the bounds of comity and finality if it applies a rule "dictated by precedent existing at the time the defendant's conviction became final." 489 U. S., at 301 (emphasis deleted). A rule that "breaks new ground or imposes a new obligation on the States or the Federal Government," *ibid.*, falls outside this universe of federal law.

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[11] It is not unusual for Congress to codify earlier precedent in the habeas context. Thus, for example, the exhaustion rule applied in *Ex parte Hawk*, 321 U. S. 114 (1944) *(per curiam)*, and the abuse of the writ doctrine applied in *Sanders* v. *United States*, 373 U. S. 1 (1963), were later codified. See 28 U. S. C. §2254(b) (1994 ed., Supp. III) (exhaustion requirement); 28 U. S. C. §2254, Rule 9(b), Rules Governing §2254 Cases in the United States District Courts. A previous version of §2254, as we stated in *Miller* v. *Fenton*, 474 U. S. 104, 111 (1985), "was an almost verbatim codification of the standards delineated in *Townsend* v. *Sain*, 372 U. S. 293 (1963), for determining when a district court must hold an evidentiary hearing before acting on a habeas petition."

[12] We are not persuaded by the argument that because Congress used the words "clearly established law" and not "new rule," it meant in this section to codify an aspect of the doctrine of executive qualified immunity rather than *Teague*'s antiretroactivity bar. Brief for Respondent 28–29, n. 19. The warden refers us specifically to §2244(b)(2)(A) and 28 U. S. C. §2254(e)(2) (1994 ed., Supp. III), in which the statute does in so many words employ the "new rule" language familiar to *Teague* and its progeny. Congress thus knew precisely the words to use if it had wished to codify *Teague per se.* That it did not use those words in §2254(d) is evidence, the argument goes, that it had something else in mind entirely in amending that section. We think, quite the contrary, that the verbatim adoption of the *Teague* language in these other sections bolsters our impression that Congress had *Teague*—and not any unrelated area of our jurisprudence—specifically in mind in amending the habeas statute. These provisions, seen together, make it impossible to conclude that Congress was not fully aware of, and interested in codifying into law, that aspect of this Court's habeas doctrine. We will not assume that in a single subsection of an amendment entirely devoted to the law of habeas corpus, Congress made the anomalous choice of reaching into the doctrinally distinct law of qualified immunity for a single phrase that just so happens to be the conceptual twin of a dominant principle in habeas law of which Congress was fully aware.

To this, AEDPA has added, immediately following the "clearly established law" requirement, a clause limiting the area of relevant law to that "determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III). If this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar. In this respect, we agree with the Seventh Circuit that this clause "extends the principle of *Teague* by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ." *Lindh* v. *Murphy*, 96 F. 3d 856, 869 (1996). As that court explained:

> "This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty in this portion of § 2254(d)(1) is not the 'contrary to' part but the reference to 'Federal law, as *determined by the Supreme Court of the United States*' (emphasis added). This extends the principle of *Teague* [v. *Lane*, 489 U. S. 288 (1989),] by limiting the

> source of doctrine on which a federal court may rely in addressing the application for a writ. It does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions." *Ibid.*

A rule that fails to satisfy the foregoing criteria is barred by *Teague* from application on collateral review, and, similarly, is not available as a basis for relief in a habeas case to which AEDPA applies.

In the context of this case, we also note that, as our precedent interpreting *Teague* has demonstrated, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule. As JUSTICE KENNEDY has explained:

> "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright* v. *West,* 505 U. S. 277, 308–309 (1992) (opinion concurring in judgment).

Moreover, the determination whether or not a rule is clearly established at the time a state court renders its final judgment of conviction is a question as to which the "federal courts must make an independent evaluation." *Id.*, at 305 (O'CONNOR, J., concurring in judgment); accord, *id.*, at 307 (KENNEDY, J., concurring in judgment).

It has been urged, in contrast, that we should read *Teague* and its progeny to encompass a broader principle of deference requiring federal courts to "validat[e] 'reasonable, good-faith interpretations' of the law" by state courts.

Brief for California et al. as *Amici Curiae* 6 (quoting *Butler* v. *McKellar,* 494 U. S. 407, 414 (1990)). The position has been bolstered with references to our statements elucidating the "new rule" inquiry as one turning on whether "reasonable jurists" would agree the rule was not clearly established. *Sawyer* v. *Smith,* 497 U. S. 227, 234 (1990). This presumption of deference was in essence the position taken by three Members of this Court in *Wright,* 505 U. S., at 290–291 (opinion of THOMAS, J.) ("[A] federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable'") (quoting *Butler,* 494 U. S., at 422 (Brennan, J., dissenting)).

*Teague,* however, does not extend this far. The often repeated language that *Teague* endorses "reasonable, good-faith interpretations" by state courts is an explanation of policy, not a statement of law. The *Teague* cases reflect this Court's view that habeas corpus is not to be used as a second criminal trial, and federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals. On the contrary, we have long insisted that federal habeas courts attend closely to those considered decisions, and give them full effect when their findings and judgments are consistent with federal law. See *Thompson* v. *Keohane,* 516 U. S. 99, 107–116 (1995). But as JUSTICE O'CONNOR explained in *Wright:*

> "[T]he duty of the federal court in evaluating whether a rule is 'new' is not the same as deference; . . . *Teague* does not direct federal courts to spend less time or effort scrutinizing the existing federal law, on the ground that they can assume the state courts interpreted it properly. . . .
>
> "[T]he maxim that federal courts should 'give great weight to the considered conclusions of a coequal state judiciary' . . . does not mean that we have held in the past that federal courts must presume the correctness

> of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." 505 U. S., at 305 (opinion concurring in judgment).

We are convinced that in the phrase, "clearly established law," Congress did not intend to modify that independent obligation.

*The "contrary to, or an unreasonable application of," requirement*

The message that Congress intended to convey by using the phrases "contrary to" and "unreasonable application of" is not entirely clear. The prevailing view in the Circuits is that the former phrase requires *de novo* review of "pure" questions of law and the latter requires some sort of "reasonability" review of so-called mixed questions of law and fact. See, *e. g., Neelley* v. *Nagle,* 138 F. 3d 917 (CA11 1998); *Drinkard* v. *Johnson,* 97 F. 3d 751 (CA5 1996); *Lindh* v. *Murphy,* 96 F. 3d 856 (CA7 1996) (en banc), rev'd on other grounds, 521 U. S. 320 (1997).

We are not persuaded that the phrases define two mutually exclusive categories of questions. Most constitutional questions that arise in habeas corpus proceedings—and therefore most "decisions" to be made—require the federal judge to apply a rule of law to a set of facts, some of which may be disputed and some undisputed. For example, an erroneous conclusion that particular circumstances established the voluntariness of a confession, or that there exists a conflict of interest when one attorney represents multiple defendants, may well be described either as "contrary to" or as an "unreasonable application of" the governing rule of law. Cf. *Miller* v. *Fenton,* 474 U. S. 104, 116 (1985); *Cuyler* v. *Sullivan,* 446 U. S. 335, 341–342 (1980). In constitutional adjudication, as in the common law, rules of law often develop incrementally as earlier decisions are applied to new factual situations. See *Wright*, 505 U. S., at 307 (KENNEDY, J., concurring in judgment). But rules that depend upon such elaboration are hardly less lawlike than those that establish a bright-line test.

Indeed, our pre-AEDPA efforts to distinguish questions of fact, questions of law, and "mixed questions," and to create an appropriate standard of habeas review for each, generated some not insubstantial differences of opinion as to which issues of law fell into which category of question, and as to which standard of review applied to each. See *Thompson*, 516 U. S., at 110–111 (acknowledging " 'that the Court has not charted an entirely clear course in this area' " and that "the proper characterization of a question as one of fact or law is sometimes slippery") (quoting *Miller*, 474 U. S., at 113). We thus think the Fourth Circuit was correct when it attributed the lack of clarity in the statute, in part, to the overlapping meanings of the phrases "contrary to" and "unreasonable application of." See *Green*, 143 F. 3d, at 870.

The statutory text likewise does not obviously prescribe a specific, recognizable standard of review for dealing with either phrase. Significantly, it does not use any term, such as "*de novo*" or "plain error," that would easily identify a familiar standard of review. Rather, the text is fairly read simply as a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case. The suggestion that a wrong state-court "decision"—a legal judgment rendered "after consideration of *facts, and . . . law*," Black's Law Dictionary 407 (6th ed. 1990) (emphasis added)—may no longer be redressed through habeas (because it is unreachable under the "unreasonable application" phrase) is based on a mistaken insistence that the § 2254(d)(1) phrases have not only independent, but mutually exclusive, meanings. Whether or not a federal court can issue the writ "under [the] 'unreasonable application' clause," the statute is clear that habeas may issue under § 2254(d)(1) if a state-court "decision" is "contrary to . . . clearly established Federal law." We thus anticipate that there will be a variety of cases, like this one, in which both phrases may be implicated.

Even though we cannot conclude that the phrases establish "a body of rigid rules," they do express a "mood" that the Federal Judiciary must respect. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 487 (1951). In this respect, it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ. Likewise, the statute in a separate provision provides for the habeas remedy when a state-court decision "was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding.*" 28 U. S. C. § 2254(d)(2) (1994 ed., Supp. III) (emphasis added). While this provision is not before us in this case, it provides relevant context for our interpretation of § 2254(d)(1); in this respect, it bolsters our conviction that federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a "mixed question" that rests on a finding of fact. AEDPA plainly sought to ensure a level of "deference to the determinations of state courts," provided those determinations did not conflict with federal law or apply federal law in an unreasonable way. H. R. Conf. Rep. No. 104–518, p. 111 (1996). Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so.

On the other hand, it is significant that the word "deference" does not appear in the text of the statute itself. Neither the legislative history nor the statutory text suggests any difference in the so-called "deference" depending on which of the two phrases is implicated.[13] Whatever "deference" Congress had in mind with respect to both phrases, it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error. As Judge Easterbrook noted with respect to the phrase "contrary to":

> "Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." *Lindh*, 96 F. 3d, at 869.[14]

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[13] As Judge Easterbrook has noted, the statute surely does not require the kind of "deference" appropriate in other contexts: "It does not tell us to 'defer' to state decisions, as if the Constitution means one thing in Wisconsin and another in Indiana. Nor does it tell us to treat state courts the way we treat federal administrative agencies. Deference after the fashion of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 . . . (1984), depends on delegation. See *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638 . . . (1990). Congress did not delegate either interpretive or executive power to the state courts. They exercise powers under their domestic law, constrained by the Constitution of the United States. 'Deference' to the jurisdictions bound by those constraints is not sensible." *Lindh* v. *Murphy*, 96 F. 3d 856, 868 (CA7 1996) (en banc), rev'd on other grounds, 521 U. S. 320 (1997).

[14] The Court advances three reasons for adopting its alternative construction of the phrase "unreasonable application of." First, the use of the word "unreasonable" in the statute suggests that Congress was directly influenced by the "patently unreasonable" standard advocated by JUSTICE THOMAS in his opinion in *Wright* v. *West*, 505 U. S. 277, 287 (1992), *post*, at 411–412; second, the legislative history supports this view, see *post*, at 408, n.; and third, Congress must have intended to change the law more substantially than our reading of 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III) permits.

None of these reasons is persuasive. First, even though, as the Court recognizes, the term "unreasonable" is "difficult to define," *post*, at 410, neither the statute itself nor the Court's explanation of it suggests that

Our disagreement with the Court about the precise meaning of the phrase "contrary to," and the word "unreasonable," is, of course, important, but should affect only a narrow category of cases. The simplest and first definition of "contrary to" as a phrase is "in conflict with." Webster's

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AEDPA's "unreasonable application of" has the same meaning as JUSTICE THOMAS' "'patently unreasonable'" standard mentioned in his dictum in *Wright*. 505 U. S., at 291 (quoting *Butler* v. *McKellar*, 494 U. S. 407, 422 (1990) (Brennan, J., dissenting)). To the extent the "broader debate" in *Wright* touched upon the Court's novel distinction today between what is "wrong" and what is "unreasonable," it was in the context of a discussion not about the *standard of review* habeas courts should use for law-application questions, but about whether a rule is "new" or "old" such that *Teague's* retroactivity rule would bar habeas relief; JUSTICE THOMAS contended that *Teague* barred habeas "whenever the state courts have interpreted old precedents *reasonably*, not [as JUSTICE O'CONNOR suggested] only when they have done so 'properly.'" 505 U. S., at 291–292, n. 8. *Teague*, of course, as JUSTICE O'CONNOR correctly pointed out, "did not establish a standard of review at all," 505 U. S., at 303–304; rather than instructing a court *how* to review a claim, it simply asks, in absolute terms, *whether* a rule was clear at the time of a state-court decision. We thus do not think *Wright* "confirms" anything about the meaning of § 2254(d)(1), which is, as our division reflects, anything but "clear." *Post*, at 412.

As for the other bases for the Court's view, the only two specific citations to the legislative history upon which it relies, *post*, at 408, do no more than beg the question. One merely quotes the language of the statute without elaboration, and the other goes to slightly greater length in stating that state-court judgments must be upheld unless "unreasonable." Neither sheds any light on what the content of the hypothetical category of "decisions" that are wrong but nevertheless not "unreasonable." Finally, while we certainly agree with the Court, *post*, at 403, that AEDPA wrought substantial changes in habeas law, see *supra*, at 386; see also, *e. g.*, 28 U. S. C. § 2244(b) (1994 ed., Supp. III) (strictly limiting second or successive petitions); § 2244(d) (1-year statute of limitations for habeas petitions); § 2254(e)(2) (limiting availability of evidentiary hearings on habeas); §§ 2263, 2266 (strict deadlines for habeas court rulings), there is an obvious fallacy in the assumption that because the statute changed pre-existing law in some respects, it must have rendered this specific change here.

Ninth New Collegiate Dictionary 285 (1983). In this sense, we think the phrase surely capacious enough to include a finding that the state-court "decision" is simply "erroneous" or wrong. (We hasten to add that even "diametrically different" from, or "opposite" to, an established federal law would seem to include "decisions" that are wrong in light of that law.) And there is nothing in the phrase "contrary to"—as the Court appears to agree—that implies anything less than independent review by the federal courts. Moreover, state-court decisions that do not "conflict" with federal law will rarely be "unreasonable" under either the Court's reading of the statute or ours. We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated. Our difference is as to the cases in which, at first blush, a state-court judgment seems entirely reasonable, but thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error. In our view, such an erroneous judgment is "unreasonable" within the meaning of the Act even though that conclusion was not immediately apparent.

In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody—or, as in this case, his sentence of death—violates the Constitution, that independent judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way,[15] we are convinced that Congress did not intend the statute to produce such a result.

## III

In this case, Williams contends that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury. The threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final. That question is easily answered because the merits of his claim are squarely governed by our holding in *Strickland* v. *Washington*, 466 U. S. 668 (1984).

We explained in *Strickland* that a violation of the right on which Williams relies has two components:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687.

To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. To establish prejudice he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694.

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[15] See, *e. g., Mackey* v. *United States*, 401 U. S. 667, 689 (1971); *Felker* v. *Turpin*, 518 U. S. 651, 667 (1996) (SOUTER, J., concurring). Indeed, a contrary rule would be in substantial tension with the interest in uniformity served by Congress' modification in AEDPA of our previous *Teague* jurisprudence—now the law on habeas review must be "clearly established" by this Court alone. See *supra*, at 381–382. It would thus seem somewhat perverse to ascribe to Congress the entirely inconsistent policy of perpetuating disparate readings of our decisions under the guise of deference to anything within a conceivable spectrum of reasonableness.

It is past question that the rule set forth in *Strickland* qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case-by-case examination of the evidence," *Wright*, 505 U. S., at 308 (KENNEDY, J., concurring in judgment), obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim. *Teague*, 489 U. S., at 301. And it can hardly be said that recognizing the right to effective counsel "breaks new ground or imposes a new obligation on the States," *ibid.* Williams is therefore entitled to relief if the Virginia Supreme Court's decision rejecting his ineffective-assistance claim was either "contrary to, or involved an unreasonable application of," that established law. It was both.

## IV

The Virginia Supreme Court erred in holding that our decision in *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), modified or in some way supplanted the rule set down in *Strickland*. It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed. 466 U. S., at 692. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *Nix* v. *Whiteside*, 475 U. S. 157, 175–176 (1986).

Similarly, in *Lockhart*, we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in *Strickland*. The death sentence that Arkansas had imposed on Bobby Ray Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). Shortly before the trial, the United States Court of Appeals for the Eighth Circuit had held that such "double counting" was impermissible, see *Collins* v. *Lockhart*, 754 F. 2d 258, 265 (1985), but Fretwell's lawyer (presumably because he was unaware of the *Collins* decision) failed to object to the use of the pecuniary gain aggravator. Before Fretwell's claim for federal habeas corpus relief reached this Court, the *Collins* case was overruled.[16] Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the State had a right to rely on the disputed aggravating circumstance. Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the *Strickland* test.[17]

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[16] In *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988), we held that an aggravating circumstance may duplicate an element of the capital offense if the class of death-eligible defendants is sufficiently narrowed by the definition of the offense itself. In *Perry* v. *Lockhart*, 871 F. 2d 1384 (1989), the Eighth Circuit correctly decided that our decision in *Lowenfield* required it to overrule *Collins*.

Cases such as *Nix* v. *Whiteside*, 475 U. S. 157 (1986), and *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him.[18] In the instant case, it is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.

Nevertheless, the Virginia Supreme Court read our decision in *Lockhart* to require a separate inquiry into fundamental fairness even when Williams is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding. It wrote:

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[17] "But the 'prejudice' component of the *Strickland* test does not implicate these concerns. It focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. [466 U. S., at 687]; see *Kimmelman*, 477 U. S., at 393 (Powell, J., concurring). Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him. As we have noted, it was the premise of our grant in this case that *Perry* was correctly decided, *i. e.*, that respondent was not entitled to an objection based on 'double counting.' Respondent therefore suffered no prejudice from his counsel's deficient performance." *Lockhart* v. *Fretwell*, 506 U. S. 364, 372 (1993).

[18] In her concurring opinion in *Lockhart*, JUSTICE O'CONNOR stressed this precise point. "I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland* v. *Washington*, 466 U. S. 668 (1984). The determinative question—whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' *id.*, at 694—remains unchanged. This case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.*, at 373.

> " 'The prisoner argues there 'is a "reasonable probability" that at least one juror would have been moved to spare Petitioner's life had he heard' the mitigation evidence developed at the habeas hearing that was not presented at the trial. Summarizing, he contends there 'is a "reasonable probability" that had at least one juror heard *any* of this evidence—let alone all of this evidence—the outcome of this case would have been different.'
>
> "We reject these contentions. The prisoner's discussion flies in the face of the Supreme Court's admonition in *Lockhart, supra,* that 'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.' " 254 Va., at 25, 487 S. E. 2d, at 199.

Unlike the Virginia Supreme Court, the state trial judge omitted any reference to *Lockhart* and simply relied on our opinion in *Strickland* as stating the correct standard for judging ineffective-assistance claims. With respect to the prejudice component, he wrote:

> "Even if a Petitioner shows that counsel's performance was deficient, however, he must also show prejudice. Petitioner must show 'that there is a reasonable probability that but for counsel's unprofessional errors, the result . . . would have been different.' *Strickland,* 466 U. S. at 694. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Id.* Indeed, it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. *Id.* at 693. The petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." App. 417.

The trial judge analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not.

We are likewise persuaded that the Virginia trial judge correctly applied both components of that standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards—a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. *Id.*, at 207, 227. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings,[19] that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

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[19] Juvenile records contained the following description of his home:

"The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." App. 528–529.

Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. *Id.*, at 595. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." *Id.*, at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison. *Id.*, at 563–566.

Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system—for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. *Id.*, at 534–536. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980).

We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of *Strickland.* After hearing the additional evidence developed in the postconviction proceedings, the very judge who presided at Williams' trial, and who once determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. App. 429. We do not agree with the Virginia Supreme Court that Judge Ingram's conclusion should be discounted because he apparently adopted "a *per se* approach to the prejudice element" that placed undue "emphasis on mere outcome determination." 254 Va., at 26–27, 487 S. E. 2d, at 200. Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgment rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.

The Virginia Supreme Court's own analysis of prejudice reaching the contrary conclusion was thus unreasonable in at least two respects. First, as we have already explained, the State Supreme Court mischaracterized at best the appropriate rule, made clear by this Court in *Strickland*, for determining whether counsel's assistance was effective within the meaning of the Constitution. While it may also have conducted an "outcome determinative" analysis of its own, 254 Va., at 27, 487 S. E. 2d, at 200, it is evident to us that the court's decision turned on its erroneous view that a "mere" difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel. See *supra*, at 394. Its analysis in this respect was thus not only "contrary to," but also, inasmuch as the Virginia Supreme Court relied on the inapplicable exception recognized in *Lockhart*, an "unreasonable application of" the clear law as established by this Court.

Second, the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation. See *Clemons* v. *Mississippi*, 494 U. S. 738, 751–752 (1990). This error is apparent in its consideration of the additional mitigation evidence developed in the postconviction proceedings. The court correctly found that as to "the factual part of the mixed question," there was "really . . . n[o] . . . dispute" that available mitigation evidence was not presented at trial. 254 Va., at 24, 487 S. E. 2d, at 198. As to the prejudice determination comprising the "legal part" of its analysis, *id.*, at 23–25, 487 S. E. 2d, at 198–199, it correctly emphasized the strength of the prosecution evidence supporting the future dangerousness aggravating circumstance.

But the state court failed even to mention the sole argument in mitigation that trial counsel did advance—Williams turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse for his actions, and cooperating with the police after that. While this, coupled with the prison records and guard testimony, may not have overcome a finding of future dangerousness, the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability. See *Boyde* v. *California*, 494 U. S. 370, 387 (1990). The circumstances recited in his several confessions are consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case. The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

## V

In our judgment, the state trial judge was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented and explained the significance of all the available evidence. It follows that the Virginia Supreme Court rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Williams' constitutional right to the effective assistance of counsel as defined in *Strickland* v. *Washington*, 466 U. S. 668 (1984), was violated.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Part II (except as to the footnote), concurred in part, and concurred in the judgment.*

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). In that Act, Congress placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners. The relevant provision, 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Court holds today that the Virginia Supreme Court's adjudication

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*JUSTICE KENNEDY joins this opinion in its entirety. THE CHIEF JUSTICE and JUSTICE THOMAS join this opinion with respect to Part II. JUSTICE SCALIA joins this opinion with respect to Part II, except as to the footnote, *infra*, at 408.

of Terry Williams' application for state habeas corpus relief resulted in just such a decision. I agree with that determination and join Parts I, III, and IV of the Court's opinion. Because I disagree, however, with the interpretation of § 2254(d)(1) set forth in Part II of JUSTICE STEVENS' opinion, I write separately to explain my views.

## I

Before 1996, this Court held that a federal court entertaining a state prisoner's application for habeas relief must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (*i. e.*, application of constitutional law to fact). See, *e. g.*, *Miller* v. *Fenton*, 474 U. S. 104, 112 (1985). In other words, a federal habeas court owed no deference to a state court's resolution of such questions of law or mixed questions. In 1991, in the case of *Wright* v. *West*, 502 U. S. 1021, we revisited our prior holdings by asking the parties to address the following question in their briefs:

> "In determining whether to grant a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific facts of the petitioner's case or should it review the state court's determination *de novo?*" *Ibid.*

Although our ultimate decision did not turn on the answer to that question, our several opinions did join issue on it. See *Wright* v. *West*, 505 U. S. 277 (1992).

JUSTICE THOMAS, announcing the judgment of the Court, acknowledged that our precedents had "treat[ed] as settled the rule that mixed constitutional questions are 'subject to plenary federal review' on habeas." *Id.*, at 289 (quoting *Miller*, *supra*, at 112). He contended, nevertheless, that those decisions did not foreclose the Court from applying a rule of deferential review for reasonableness in future cases.

See 505 U. S., at 287–290. According to JUSTICE THOMAS, the reliance of our precedents on *Brown* v. *Allen,* 344 U. S. 443 (1953), was erroneous because the Court in *Brown* never explored in detail whether a federal habeas court, to deny a state prisoner's application, must conclude that the relevant state-court adjudication was "correct" or merely that it was "reasonable." *Wright, supra,* at 287. JUSTICE THOMAS suggested that the time to revisit our decisions may have been at hand, given that our more recent habeas jurisprudence in the nonretroactivity context, see, *e. g., Teague* v. *Lane,* 489 U. S. 288 (1989), had called into question the then-settled rule of independent review of mixed constitutional questions. *Wright,* 505 U. S., at 291–292, 294.

I wrote separately in *Wright* because I believed JUSTICE THOMAS had "understate[d] the certainty with which *Brown* v. *Allen* rejected a deferential standard of review of issues of law." *Id.,* at 300. I also explained that we had considered the standard of review applicable to mixed constitutional questions on numerous occasions and each time we concluded that federal habeas courts had a duty to evaluate such questions independently. *Id.,* at 301–303. With respect to JUSTICE THOMAS' suggestion that *Teague* and its progeny called into question the vitality of the independent-review rule, I noted that "*Teague* did not establish a 'deferential' standard of review" because "[i]t did not establish a standard of review at all." 505 U. S., at 303–304. While *Teague* did hold that state prisoners could not receive "the retroactive benefit of new rules of law," it "did *not* create any deferential standard of review with regard to old rules." 505 U. S., at 304 (emphasis in original).

Finally, and perhaps most importantly for purposes of today's case, I stated my disagreement with JUSTICE THOMAS' suggestion that *de novo* review is incompatible with the maxim that federal habeas courts should "give great weight to the considered conclusions of a coequal state judiciary," *Miller, supra,* at 112. Our statement in *Miller* signified only that a state-court decision is due the same respect as any other "persuasive, well-reasoned authority." *Wright,* 505 U. S., at 305. "But this does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Ibid.* Under the federal habeas statute as it stood in 1992, then, our precedents dictated that a federal court should grant a state prisoner's petition for habeas relief if that court were to conclude in its independent judgment that the relevant state court had erred on a question of constitutional law or on a mixed constitutional question.

If today's case were governed by the federal habeas statute prior to Congress' enactment of AEDPA in 1996, I would agree with JUSTICE STEVENS that Williams' petition for habeas relief must be granted if we, in our independent judgment, were to conclude that his Sixth Amendment right to effective assistance of counsel was violated. See *ante,* at 389.

## II

### A

Williams' case is *not* governed by the pre-1996 version of the habeas statute. Because he filed his petition in December 1997, Williams' case is governed by the statute as amended by AEDPA. Section 2254 now provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly estab-

> lished Federal law, as determined by the Supreme Court of the United States."

Accordingly, for Williams to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1). That provision modifies the role of federal habeas courts in reviewing petitions filed by state prisoners.

JUSTICE STEVENS' opinion in Part II essentially contends that § 2254(d)(1) does not alter the previously settled rule of independent review. Indeed, the opinion concludes its statutory inquiry with the somewhat empty finding that § 2254(d)(1) does no more than express a "'mood' that the Federal Judiciary must respect." *Ante,* at 386. For JUSTICE STEVENS, the congressionally enacted "mood" has two important qualities. First, "federal courts [must] attend to every state-court judgment with utmost care" by "carefully weighing all the reasons for accepting a state court's judgment." *Ante,* at 389. Second, if a federal court undertakes that careful review and yet remains convinced that a prisoner's custody violates the Constitution, "that independent judgment should prevail." *Ibid.*

One need look no further than our decision in *Miller* to see that JUSTICE STEVENS' interpretation of § 2254(d)(1) gives the 1996 amendment no effect whatsoever. The command that federal courts should now use the "utmost care" by "carefully weighing" the reasons supporting a state court's judgment echoes our pre-AEDPA statement in *Miller* that federal habeas courts "should, of course, give great weight to the considered conclusions of a coequal state judiciary." 474 U. S., at 112. Similarly, the requirement that the independent judgment of a federal court must in the end prevail essentially repeats the conclusion we reached in the very next sentence in *Miller* with respect to the specific issue presented there: "But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution *is a matter for independent federal determination.*" *Ibid.* (emphasis added).

That JUSTICE STEVENS would find the new § 2254(d)(1) to have no effect on the prior law of habeas corpus is remarkable given his apparent acknowledgment that Congress wished to bring change to the field. See *ante,* at 386 ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"). That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved.

JUSTICE STEVENS arrives at his erroneous interpretation by means of one critical misstep. He fails to give independent meaning to both the "contrary to" and "unreasonable application" clauses of the statute. See, *e. g., ante,* at 384 ("We are not persuaded that the phrases define two mutually exclusive categories of questions"). By reading § 2254(d)(1) as one general restriction on the power of the federal habeas court, JUSTICE STEVENS manages to avoid confronting the specific meaning of the statute's "unreasonable application" clause and its ramifications for the independent-review rule. It is, however, a cardinal principle of statutory construction that we must "'give effect, if possible, to every clause and word of a statute.'" *United States* v. *Menasche,* 348 U. S. 528, 538–539 (1955) (quoting *Montclair* v. *Ramsdell,* 107 U. S. 147, 152 (1883)). Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States." (Emphases added.)

The Court of Appeals for the Fourth Circuit properly accorded both the "contrary to" and "unreasonable application" clauses independent meaning. The Fourth Circuit's interpretation of § 2254(d)(1) in Williams' case relied, in turn, on that court's previous decision in *Green* v. *French,* 143 F. 3d 865 (1998), cert. denied, 525 U. S. 1090 (1999). See 163 F. 3d 860, 866 (CA4 1998) ("[T]he standard of review enunciated in *Green v. French* continues to be the binding law of this Circuit"). With respect to the first of the two statutory clauses, the Fourth Circuit held in *Green* that a state-court decision can be "contrary to" this Court's clearly established precedent in two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours. See 143 F. 3d, at 869–870.

The word "contrary" is commonly understood to mean "diametrically different," "opposite in character or nature," or "mutually opposed." Webster's Third New International Dictionary 495 (1976). The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court. The Fourth Circuit's interpretation of the "contrary to" clause accurately reflects this textual meaning. A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland* v. *Washington,* 466 U. S. 668 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id.*, at 694. A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause. Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state-court decision as "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to *Strickland,* our clearly established precedent. Although the state-court decision may be contrary to the federal court's conception of how *Strickland* ought to be applied in that particular case, the decision is not "mutually opposed" to *Strickland* itself.

JUSTICE STEVENS would instead construe § 2254(d)(1)'s "contrary to" clause to encompass such a routine state-court decision. That construction, however, saps the "unreasonable application" clause of any meaning. If a federal habeas court can, under the "contrary to" clause, issue the writ whenever it concludes that the state court's *application* of clearly established federal law was incorrect, the "unreasonable application" clause becomes a nullity. We must, however, if possible, give meaning to every clause of the statute. JUSTICE STEVENS not only makes no attempt to do so, but also construes the "contrary to" clause in a manner that ensures that the "unreasonable application" clause will have no independent meaning. See *ante,* at 385–386, 388–390. We reject that expansive interpretation of the statute. Reading § 2254(d)(1)'s "contrary to" clause to permit a federal court to grant relief in cases where a state court's error is limited to the manner in which it *applies* Supreme Court precedent is suspect given the logical and natural fit of the neighboring "unreasonable application" clause to such cases.

The Fourth Circuit's interpretation of the "unreasonable application" clause of § 2254(d)(1) is generally correct. That court held in *Green* that a state-court decision can involve an "unreasonable application" of this Court's clearly established precedent in two ways. First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. See 143 F. 3d, at 869–870.

A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision "involv[ing] an unreasonable application of . . . clearly established Federal law." Indeed, we used the almost identical phrase "application of law" to describe a state court's application of law to fact in the certiorari question we posed to the parties in *Wright.*[*]

The Fourth Circuit also held in *Green* that state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s "unreasonable application" clause. See 143 F. 3d, at 869–870. Although that holding may perhaps be correct, the classification does have some problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that "arrives at a conclusion opposite to that reached by this Court on a question of law," *supra,* at 405. Today's case does not require us to decide how such "extension of legal principle" cases should be treated under § 2254(d)(1). For now it is sufficient to hold that when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's "unreasonable application" clause.

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[*] The legislative history of § 2254(d)(1) also supports this interpretation. See, *e. g.,* 142 Cong. Rec. 7799 (1996) (remarks of Sen. Specter) ("[U]nder the bill deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld"); 141 Cong. Rec. 14666 (1995) (remarks of Sen. Hatch) ("[W]e allow a Federal court to overturn a State court decision only if it is contrary to clearly established Federal law or if it involves an 'unreasonable application' of clearly established Federal law to the facts").

### B

There remains the task of defining what exactly qualifies as an "unreasonable application" of law under § 2254(d)(1). The Fourth Circuit held in *Green* that a state-court decision involves an "unreasonable application of . . . clearly established Federal law" only if the state court has applied federal law "in a manner that reasonable jurists would all agree is unreasonable." 143 F. 3d, at 870. The placement of this additional overlay on the "unreasonable application" clause was erroneous. It is difficult to fault the Fourth Circuit for using this language given the fact that we have employed nearly identical terminology to describe the related inquiry undertaken by federal courts in applying the nonretroactivity rule of *Teague.* For example, in *Lambrix* v. *Singletary,* 520 U. S. 518 (1997), we stated that a new rule is not dictated by precedent unless it would be "apparent to *all reasonable jurists.*" *Id.,* at 528 (emphasis added). In *Graham* v. *Collins,* 506 U. S. 461 (1993), another nonretroactivity case, we employed similar language, stating that we could not say "that *all reasonable jurists* would have deemed themselves compelled to accept Graham's claim in 1984." *Id.,* at 477 (emphasis added).

Defining an "unreasonable application" by reference to a "reasonable jurist," however, is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its "reasonable jurist" standard in just such a subjective manner. See *Drinkard* v. *Johnson,* 97 F. 3d 751, 769 (1996) (holding that state court's application of federal law was not unreasonable because the Fifth Circuit panel split 2–1 on the underlying mixed constitutional question), cert. denied, 520 U. S. 1107 (1997). As I explained in *Wright* with respect to the "reasonable jurist" standard in the *Teague* context, "[e]ven though we have characterized the new rule inquiry as whether 'reasonable jurists' could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." 505 U. S., at 304 (citation omitted).

The term "unreasonable" is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Our opinions in *Wright,* for example, make that difference clear. JUSTICE THOMAS' criticism of this Court's subsequent reliance on *Brown* turned on that distinction. The Court in *Brown,* JUSTICE THOMAS contended, held only that a federal habeas court must determine whether the relevant state-court adjudication resulted in a "'satisfactory conclusion.'" 505 U. S., at 287 (quoting *Brown,* 344 U. S., at 463). In JUSTICE THOMAS' view, *Brown* did not answer "the question whether a 'satisfactory' conclusion was one that the habeas court considered *correct,* as opposed to merely *reasonable.*" 505 U. S., at 287 (emphases in original). In my separate opinion in *Wright,* I made the same distinction, maintaining that "a state court's *incorrect* legal determination has [never] been allowed to stand because it was *reasonable.* We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.,* at 305 (emphases added). In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

JUSTICE STEVENS turns a blind eye to the debate in *Wright* because he finds no indication in § 2254(d)(1) itself that Congress was "directly influenced" by JUSTICE THOMAS' opinion in *Wright. Ante,* at 387–388, n. 14. As JUSTICE STEVENS himself apparently recognizes, however, Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt either a rule or a meaning given a certain term in that decision. See *ante,* at 380, n. 11. In any event, whether Congress intended to codify the standard of review suggested by JUSTICE THOMAS in *Wright* is beside the point. *Wright* is important for the light it sheds on § 2254(d)(1)'s requirement that a federal habeas court inquire into the reasonableness of a state court's application of clearly established federal law. The separate opinions in *Wright* concerned the very issue addressed by § 2254(d)(1)'s "unreasonable application" clause—whether, in reviewing a state-court decision on a state prisoner's claims under federal law, a federal habeas court should ask whether the state-court decision was correct or simply whether it was reasonable. JUSTICE STEVENS' claim that the debate in *Wright* concerned only the meaning of the *Teague* nonretroactivity rule is simply incorrect. See *ante,* at 387–388, n. 14. As even a cursory review of JUSTICE THOMAS' opinion and my own opinion reveals, both the broader debate and the specific statements to which we refer, see *supra,* at 410–411, concerned precisely the issue of the standard of review to be employed by federal habeas courts. The *Wright* opinions confirm what § 2254(d)(1)'s language already makes clear—that an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law.

Throughout this discussion the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision. In this respect, the "clearly established Federal law" phrase bears only a slight connection to our *Teague* jurisprudence. With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1). See, *e. g., Stringer* v. *Black,* 503 U. S. 222, 228 (1992) (using term "old rule"). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.

In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

## III

Although I disagree with JUSTICE STEVENS concerning the standard we must apply under § 2254(d)(1) in evaluating Terry Williams' claims on habeas, I agree with the Court that the Virginia Supreme Court's adjudication of Williams' claim of ineffective assistance of counsel resulted in a decision that was both contrary to and involved an unreasonable application of this Court's clearly established precedent. Specifically, I believe that the Court's discussion in Parts III and IV is correct and that it demonstrates the reasons that the Virginia Supreme Court's decision in Williams' case, even under the interpretation of § 2254(d)(1) I have set forth above, was both contrary to and involved an unreasonable application of our precedent.

First, I agree with the Court that our decision in *Strickland* undoubtedly qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of § 2254(d)(1). See *ante,* at 390–391. Second, I agree that the Virginia Supreme Court's decision was contrary to that clearly established federal law to the extent it held that our decision in *Lockhart* v. *Fretwell,* 506 U. S. 364 (1993), somehow modified or supplanted the rule set forth in *Strickland.* See *ante,* at 391–395, 397. Specifically, the Virginia Supreme Court's decision was contrary to *Strickland* itself, where we held that a defendant demonstrates prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. The Virginia Supreme Court held, in contrast, that such a focus on outcome determination was insufficient standing alone. See *Williams* v. *Warden of Mecklenburg Correctional Center,* 254 Va. 16, 25, 27, 487 S. E. 2d 194, 199, 200 (1997). *Lockhart* does not support that broad proposition. As I explained in my concurring opinion in that case, "in the vast majority of cases . . . [t]he determinative question—whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'—remains unchanged." 506 U. S., at 373 (quoting *Strickland,* 466 U. S., at 694). In his attempt to demonstrate prejudice, Williams did not rely on any "considerations that, as a matter of law, ought not inform the [prejudice] inquiry." *Lockhart, supra,* at 373 (O'CONNOR, J., concurring). Accordingly, as the Court ably explains, the Virginia Supreme Court's decision was contrary to *Strickland.*

To be sure, as THE CHIEF JUSTICE notes, *post,* at 417–418 (opinion concurring in part and dissenting in part), the Virginia Supreme Court did also inquire whether Williams had demonstrated a reasonable probability that, but for his trial counsel's unprofessional errors, the result of his sentencing would have been different. See 254 Va., at 25–26, 487 S. E. 2d, at 199–200. It is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that Williams suffered no prejudice. For example, at the conclusion of its discussion of whether Williams had demonstrated a reasonable probability of a different outcome at sentencing, the Virginia Supreme Court faulted the Virginia Circuit Court for its "emphasis on mere outcome determination, without proper attention to whether the result of the criminal proceeding was fundamentally unfair or unreliable." 254 Va., at 27, 487 S. E. 2d, at 200. As the Court explains, however, see *ante,* at 393, Williams' case did not implicate the unusual circumstances present in cases like *Lockhart* or *Nix* v. *Whiteside,* 475 U. S. 157 (1986). Accordingly, for the very reasons I set forth in my *Lockhart* concurrence, the emphasis on outcome was entirely appropriate in Williams' case.

Third, I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland,* its application was unreasonable. See *ante,* at 395–398. As the Court correctly recounts, Williams' trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation evidence. See *ante,* at 395–396. For example, speaking only of that evidence concerning Williams' "nightmarish childhood," *ante,* at 395, the mitigation evidence that trial counsel failed to present to the jury showed that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody," *ibid.* (footnote omitted). See also *ante,* at 395, n. 19. The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life. More generally, the Virginia Circuit Court found that Williams' trial counsel failed to present evidence showing that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; . . . that he was borderline mentally retarded;" and that "[his] conduct had been good in certain structured settings in his life (such as when he was incarcerated)." App. 422–423. In addition, the Circuit

Court noted the existence of "friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities." *Id.*, at 423. Based on its consideration of all of this evidence, the same trial judge that originally found Williams' death sentence "'justified and warranted,'" *id.*, at 155, concluded that trial counsel's deficient performance prejudiced Williams, *id.*, at 424, and accordingly recommended that Williams be granted a new sentencing hearing, *ibid.* The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. See 254 Va., at 26, 487 S. E. 2d, at 200 ("At most, this evidence would have shown that numerous people, mostly relatives, thought that [Williams] was nonviolent and could cope very well in a structured environment"). For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court's decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Accordingly, although I disagree with the interpretation of § 2254(d)(1) set forth in Part II of JUSTICE STEVENS' opinion, I join Parts I, III, and IV of the Court's opinion and concur in the judgment of reversal.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in part and dissenting in part.

I agree with the Court's interpretation of 28 U. S. C. § 2254(d)(1) (1994 ed., Supp. III), see *ante*, at 402–413 (opinion of O'CONNOR, J.), but disagree with its decision to grant habeas relief in this case.

There is "clearly established Federal law, as determined by [this Court]" that governs petitioner's claim of ineffective assistance of counsel: *Strickland* v. *Washington*, 466 U. S. 668 (1984). Thus, we must determine whether the Virginia

Supreme Court's adjudication was "contrary to" or an "unreasonable application of" *Strickland.*

Generally, in an ineffective-assistance-of-counsel case where the state court applies *Strickland,* federal habeas courts can proceed directly to "unreasonable application" review. But, according to the substance of petitioner's argument, this could be one of the rare cases where a state court applied the wrong Supreme Court precedent, and, consequently, reached an incorrect result. Petitioner argues, and the Court agrees, that the Virginia Supreme Court improperly held that *Lockhart* v. *Fretwell,* 506 U. S. 364 (1993), "modified or in some way supplanted" the rule set down in *Strickland.* See *ante,* at 391. I agree that such a holding would be improper. But the Virginia Supreme Court did not so hold as it did not rely on *Lockhart* to reach its decision.

Before delving into the evidence presented at the sentencing proceeding, the Virginia Supreme Court stated:

> "We shall demonstrate that the criminal proceeding sentencing defendant to death was not fundamentally unfair or unreliable, and that the prisoner's assertions about the potential effects of the omitted proof do not establish a 'reasonable probability' that the result of the proceeding would have been different, nor any probability sufficient to undermine confidence in the outcome. Therefore, any ineffective assistance of counsel did not result in actual prejudice to the accused." *Williams* v. *Warden,* 254 Va. 16, 25, 487 S. E. 2d 194, 199 (1997).

While the first part of this statement refers to *Lockhart,* the rest of the statement is straight out of *Strickland.* Indeed, after the initial allusion to *Lockhart,* the Virginia Supreme Court's analysis explicitly proceeds under *Strickland* alone.*

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*In analyzing the evidence that was presented to the sentencing jury, the Virginia Supreme Court stated: "Drawing on *Strickland,* we hold that, even assuming the challenged conduct of counsel was unreasonable, the prisoner 'suffered insufficient prejudice to warrant setting aside his death

See 254 Va., at 26–27, 487 S. E. 2d, at 200. Because the Virginia Supreme Court did not rely on *Lockhart* to make its decision, and, instead, appropriately relied on *Strickland,* that court's adjudication was not "contrary to" this Court's clearly established precedent.

The question then becomes whether the Virginia Supreme Court's adjudication resulted from an "unreasonable application of" *Strickland.* In my view, it did not.

I, like the Virginia Supreme Court and the Federal Court of Appeals below, will assume without deciding that counsel's performance fell below an objective standard of reasonableness. As to the prejudice inquiry, I agree with the Court of Appeals that evidence showing that petitioner presented a future danger to society was overwhelming. As that court stated:

> "The murder of Mr. Stone was just one act in a crime spree that lasted most of Williams's life. Indeed, the jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." 163 F. 3d 860, 868 (CA4 1998).

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sentence,'" 254 Va., at 26, 487 S. E. 2d, at 200 (quoting *Strickland* v. *Washington,* 466 U. S. 668, 698–699 (1984)); "[w]hat the Supreme Court said in *Strickland* applies with full force here: 'Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed;'" 254 Va., at 26, 487 S. E. 2d, at 200 (quoting *Strickland, supra,* at 700); and "[i]n conclusion, employing the language of *Strickland,* the prisoner 'has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. [The prisoner's] sentencing proceeding was not fundamentally unfair,'" 254 Va., at 27, 487 S. E. 2d, at 200 (quoting *Strickland, supra,* at 700).

In *Strickland*, we said that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. 466 U. S., at 698. It is with this kind of a question that the "unreasonable application of" clause takes on meaning. While the determination of "prejudice" in the legal sense may be a question of law, the subsidiary inquiries are heavily factbound.

Here, there was strong evidence that petitioner would continue to be a danger to society, both in and out of prison. It was not, therefore, unreasonable for the Virginia Supreme Court to decide that a jury would not have been swayed by evidence demonstrating that petitioner had a terrible childhood and a low IQ. See *ante*, at 395–396. The potential mitigating evidence that may have countered the finding that petitioner was a future danger was testimony that petitioner was not dangerous while in detention. See *ante*, at 396. But, again, it is not unreasonable to assume that the jury would have viewed this mitigation as unconvincing upon hearing that petitioner set fire to his cell while awaiting trial for the murder at hand and has repeated visions of harming other inmates.

Accordingly, I would hold that habeas relief is barred by 28 U. S. C. § 2254(d) (1994 ed., Supp. III).

# WILLIAMS *v.* TAYLOR, WARDEN

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99–6615. Argued February 28, 2000—Decided April 18, 2000

After petitioner was convicted of two capital murders and other crimes, he was sentenced to death. The Supreme Court of Virginia affirmed on direct appeal and later dismissed petitioner's state habeas corpus petition. He then sought federal habeas relief, requesting, among other things, an evidentiary hearing on three constitutional claims, which he had been unable to develop in the state-court proceedings. Those claims were that (1) the prosecution had violated *Brady* v. *Maryland,* 373 U. S. 83, in failing to disclose a report of a pretrial psychiatric examination of Jeffrey Cruse, petitioner's accomplice and the Commonwealth's main witness against petitioner; (2) the trial was rendered unfair by the seating of a juror who at *voir dire* had not revealed possible sources of bias; and (3) a prosecutor committed misconduct in failing to reveal his knowledge of the juror's possible bias. The District Court granted an evidentiary hearing on, *inter alia,* the latter two claims, but denied a hearing on the *Brady* claim. Before any hearing could be held, however, the Fourth Circuit granted the Commonwealth's requests for an emergency stay and for a writ of mandamus and prohibition, which were based on the argument that an evidentiary hearing was prohibited by 28 U. S. C. § 2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). On remand, the District Court vacated its order granting an evidentiary hearing and dismissed the petition, having determined petitioner could not satisfy § 2254(e)(2)'s requirements. In affirming, the Fourth Circuit agreed with petitioner's argument that the statute would not apply if he had exercised diligence in state court, but held, among other things, that he had not been diligent and so had "failed to develop the factual basis of [his three] claim[s] in State court," § 2254(e)(2). The court concluded that petitioner could not satisfy the statute's conditions for excusing his failure to develop the facts and held him barred from receiving an evidentiary hearing.

*Held:* Under § 2254(e)(2), as amended by AEDPA, a "fail[ure] to develop" a claim's factual basis in state-court proceedings is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or his counsel. The statute does not bar the evidentiary hearing petitioner seeks on his juror bias and prosecutorial misconduct claims, but bars a hearing on his *Brady* claim because he "failed to develop" that claim's factual basis in state court and concedes his inability to satisfy the statute's further stringent conditions for excusing the deficiency. Pp. 429–445.

(a) Petitioner filed his federal habeas petition after AEDPA's effective date, so his case is controlled by § 2254(e)(2)'s opening clause, which specifies that "[i]f the [federal habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim" unless the applicant makes specified showings. Pp. 429–430.

(b) The analysis begins with the language of the statute. Although "fail" is sometimes used in a neutral way, not importing fault or want of diligence, this is not the sense in which the word "failed" is used in § 2254(e)(2). A statute's words must be given their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import. *E. g., Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202, 207. In its customary and preferred sense, "fail" connotes some omission, fault, or negligence on the part of the person who has failed to do something. If Congress had instead intended a "no-fault" standard, it would have had to do no more than use, in lieu of the phrase "has failed to," the phrase "did not." This interpretation has support in *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 8, whose threshold standard of diligence is codified in § 2254(e)(2)'s opening clause. The Court's interpretation also avoids putting § 2254(e)(2) in needless tension with § 2254(d), which authorizes habeas relief if the prisoner developed his claim in state court and can prove the state court's decision was "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." This Court rejects the Commonwealth's arguments for a "no-fault" reading: that treating the prisoner's lack of diligence in state court as a prerequisite for application of § 2254(e)(2) renders a nullity of § 2254(e)(2)(A)(ii)'s provision requiring the prisoner to show "a factual predicate [of his claim] could not have been previously discovered through the exercise of due diligence"; and that anything less than a no-fault understanding of § 2254(e)(2) is contrary to AEDPA's purpose to further comity, finality, and federalism principles. Pp. 431–437.

(c) Petitioner did not exercise the diligence required to preserve his claim that nondisclosure of Cruse's psychiatric report contravened *Brady*. The report, which mentioned Cruse had little recollection of the murders because he was intoxicated at the time, was prepared before petitioner was tried; yet it was not raised by petitioner until he filed his federal habeas petition. Given evidence in the record that his state habeas counsel knew of the report's existence and its potential importance, yet failed to investigate in anything but a cursory manner, this Court is not satisfied with petitioner's explanation that, although an investigator for his federal habeas counsel discovered the report in Cruse's court file, his state counsel had not seen the report when he reviewed the same file. Because this constitutes a failure to develop the factual basis of petitioner's *Brady* claim in state court, this Court must determine if the requirements in the balance of § 2254(e)(2) are satisfied so that petitioner's failure is excused. Subparagraph (B) of § 2254(e)(2) conditions a hearing upon a showing, by clear and convincing evidence, that no reasonable factfinder would have found petitioner guilty of capital murder but for the alleged constitutional error. Petitioner concedes he cannot make this showing, and the case has been presented to this Court on that premise. Accordingly, the Fourth Circuit's judgment barring an evidentiary hearing on this claim is affirmed. Pp. 437–440.

(d) However, petitioner has met the burden of showing he was diligent in efforts to develop the facts supporting his juror bias and prosecutorial misconduct claims in state court. Those claims are based on two questions posed by the trial judge at *voir dire.* First, the judge asked prospective jurors whether any of them was related to, *inter alios,* Deputy Sheriff Meinhard, who investigated the crime scene, interrogated Cruse, and later became the prosecution's first witness. Venire member Stinnett, who had divorced Meinhard after a 17-year marriage and four children, remained silent, thereby indicating the answer to the question was "no." Second, the judge asked whether any prospective juror had ever been represented by any of the attorneys in the case, including prosecutor Woodson. Stinnett again said nothing, although Woodson had represented her during her divorce from Meinhard. Later, Woodson admitted he knew Stinnett and Meinhard had been married and divorced, but stated that he did not consider divorced people to be "related" and that he had no recollection of having been involved as a private attorney in the divorce. Stinnett's silence after the first question could suggest to the factfinder an unwillingness to be forthcoming; this in turn could bear on her failure to disclose that Woodson had been her attorney. Moreover, her failure to divulge material information in response to the second question was misleading as a matter of fact because Woodson was her counsel. Coupled with Woodson's own reticence, these omissions as a whole disclose the need for an evidentiary hearing. This Court disagrees with the Fourth Circuit's conclusion that petitioner's state habeas counsel should have discovered Stinnett's relationship to Meinhard and Woodson. The trial record contains no evidence which would have put a reasonable attorney on notice that Stinnett's nonresponse was a deliberate omission of material information, and counsel had no reason to believe Stinnett had been married to Meinhard or been represented by Woodson. Moreover, because state postconviction relief was no longer available at the time the facts came to light, it would have been futile for petitioner to return to the Virginia courts, so that he cannot be said to have failed to develop the facts in state court by reason of having neglected to pursue remedies available under Virginia law. The foregoing analysis establishes cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance. Questions regarding the standard for determining the prejudice that petitioner must establish to obtain relief on these claims can be addressed by the lower courts during further proceedings. These courts should take due account of the District Court's earlier decision to grant an evidentiary hearing based in part on its belief that Stinnett deliberately lied on *voir dire*. Pp. 440–444.

189 F. 3d 421, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

*John H. Blume* argued the cause for petitioner. With him on the briefs were *Keir M. Weyble*, *Barbara L. Hartung*, by appointment of the Court, 528 U. S. 1044, and *James E. Moore*.

*Donald R. Curry*, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief was *Mark L. Earley*, Attorney General.*

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*A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *David P. Druliner*, Chief Assistant Attorney General, *John R. Gorey*, Acting Senior Assistant Attorney General, and *Donald E. De Nicola*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Michael F. Easley* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota,

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner Michael Wayne Williams received a capital sentence for the murders of Morris Keller, Jr., and Keller's wife, Mary Elizabeth. Petitioner later sought a writ of habeas corpus in federal court. Accompanying his petition was a request for an evidentiary hearing on constitutional claims which, he alleged, he had been unable to develop in state-court proceedings. The question in this case is whether 28 U. S. C. § 2254(e)(2) (1994 ed., Supp. III), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, bars the evidentiary hearing petitioner seeks. If petitioner "has failed to develop the factual basis of [his] claim[s] in State court proceedings," his case is subject to § 2254(e)(2), and he may not receive a hearing because he concedes his inability to satisfy the statute's further stringent conditions for excusing the deficiency.

## I

On the evening of February 27, 1993, Verena Lozano James dropped off petitioner and his friend Jeffrey Alan Cruse near a local store in a rural area of Cumberland County, Virginia. The pair planned to rob the store's employees and customers using a .357 revolver petitioner had stolen in the course of a quadruple murder and robbery he had committed two months earlier. Finding the store closed, petitioner and Cruse walked to the Kellers' home. Petitioner was familiar with the couple, having grown up down the road from where they lived. He told Cruse they would have "a couple thousand dollars." App. 78. Cruse, who had been holding the .357, handed the gun to petitioner and knocked on the door. When Mr. Keller opened the door, petitioner pointed the gun at him as the two intruders forced their way inside. Petitioner and Cruse forced Mr. Keller to the kitchen, where

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*John Cornyn* of Texas, *Jan Graham* of Utah, and *Christine O. Gregoire* of Washington.

they discovered Mrs. Keller. Petitioner ordered the captives to remove their clothing. While petitioner kept guard on the Kellers, Cruse searched the house for money and other valuables. He found a .38-caliber handgun and bullets. Upon Cruse's return to the kitchen, petitioner had Cruse tie their captives with telephone cords. The Kellers were confined to separate closets while the intruders continued ransacking the house.

When they gathered all they wanted, petitioner and Cruse decided to rape Mrs. Keller. With Mrs. Keller pleading with them not to hurt her or her husband, petitioner raped her. Cruse did the same. Petitioner then ordered the Kellers to shower and dress and "take a walk" with him and Cruse. *Id.*, at 97. As they were leaving, petitioner told Mrs. Keller he and Cruse were going to burn down the house. Mrs. Keller begged to be allowed to retrieve her marriage license, which she did, guarded by petitioner.

As the prosecution later presented the case, details of the murders were as follows. Petitioner, now carrying the .38, and Cruse, carrying the .357, took the Kellers to a thicket down a dirt road from the house. With petitioner standing behind Mr. Keller and Cruse behind Mrs. Keller, petitioner told Cruse, "We'll shoot at the count of three." *Id.*, at 103. At the third count, petitioner shot Mr. Keller in the head, and Mr. Keller collapsed to the ground. Cruse did not shoot Mrs. Keller at the same moment. Saying "he didn't want to leave no witnesses," petitioner urged Cruse to shoot Mrs. Keller. *Ibid.* Cruse fired one shot into her head. Despite his wound, Mr. Keller stood up, but petitioner shot him a second time. To ensure the Kellers were dead, petitioner shot each of them two or three more times.

After returning to the house and loading the stolen property into the Kellers' jeep, petitioner and Cruse set fire to the house and drove the jeep to Fredericksburg, Virginia, where they sold some of the property. They threw the remaining property and the .357 revolver into the Rappahannock River and set fire to the jeep.

Pursuing a lead from Verena James, the police interviewed Cruse about the fire at the Kellers' home. Petitioner had fled to Florida. Cruse provided no useful information until the police discovered the bodies of the victims, at which point Cruse consulted counsel. In a plea bargain Cruse agreed to disclose the details of the crimes in exchange for the Commonwealth's promise not to seek the death penalty against him. Cruse described the murders but made no mention of his own act of rape. When the Commonwealth discovered the omission, it revoked the plea agreement and charged Cruse with capital murder.

Petitioner was arrested and charged with robbery, abduction, rape, and the capital murders of the Kellers. At trial in January 1994, Cruse was the Commonwealth's main witness. He recounted the murders as we have just described. Cruse testified petitioner raped Mrs. Keller, shot Mr. Keller at least twice, and shot Mrs. Keller several times after she had been felled by Cruse's bullet. He also described petitioner as the mastermind of the murders. The circumstances of the first plea agreement between the Commonwealth and Cruse and its revocation were disclosed to the jury. *Id.*, at 158–159. Testifying on his own behalf, petitioner admitted he was the first to shoot Mr. Keller and it was his idea to rob the store and set fire to the house. He denied, however, raping or shooting Mrs. Keller, and claimed to have shot Mr. Keller only once. Petitioner blamed Cruse for the remaining shots and disputed some other parts of Cruse's testimony.

The jury convicted petitioner on all counts. After considering the aggravating and mitigating evidence presented during the sentencing phase, the jury found the aggravating circumstances of future dangerousness and vileness of the crimes and recommended a death sentence. The trial court imposed the recommended sentence. The Supreme Court of Virginia affirmed petitioner's convictions and sentence, *Williams* v. *Commonwealth*, 248 Va. 528, 450 S. E. 2d 365 (1994), and we denied certiorari, *Williams* v. *Virginia*, 515 U. S. 1161 (1995). In a separate proceeding, Cruse pleaded guilty to the capital murder of Mrs. Keller and the first-degree murder of Mr. Keller. After the prosecution asked the sentencing court to spare his life because of his testimony against petitioner, Cruse was sentenced to life imprisonment.

Petitioner filed a habeas petition in state court alleging, in relevant part, that the Commonwealth failed to disclose a second agreement it had reached with Cruse after the first one was revoked. The new agreement, petitioner alleged, was an informal undertaking by the prosecution to recommend a life sentence in exchange for Cruse's testimony. Finding no merit to petitioner's claims, the Virginia Supreme Court dismissed the habeas petition, and we again denied certiorari. *Williams* v. *Netherland*, 519 U. S. 877 (1996).

Petitioner filed a habeas petition in the United States District Court for the Eastern District of Virginia on November 20, 1996. In addition to his claim regarding the alleged undisclosed agreement between the Commonwealth and Cruse, the petition raised three claims relevant to questions now before us. First, petitioner claimed the prosecution had violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), in failing to disclose a report of a confidential pretrial psychiatric examination of Cruse. Second, petitioner alleged his trial was rendered unfair by the seating of a juror who at *voir dire* had not revealed possible sources of bias. Finally, petitioner alleged one of the prosecutors committed misconduct in failing to reveal his knowledge of the juror's possible bias.

The District Court granted an evidentiary hearing on the undisclosed agreement and the allegations of juror bias and prosecutorial misconduct but denied a hearing on the psychiatric report. Before the evidentiary hearing could be held, the Commonwealth filed an application for an emergency stay and a petition for a writ of mandamus and prohibition in the Court of Appeals. The Commonwealth argued that petitioner's evidentiary hearing was prohibited by 28 U. S. C. § 2254(e)(2) (1994 ed., Supp. III). A divided panel of the Court of Appeals granted the emergency stay and remanded for the District Court to apply the statute to petitioner's request for an evidentiary hearing. On remand, the District Court vacated its order granting an evidentiary hearing and dismissed the petition, having determined petitioner could not satisfy § 2254(e)(2)'s requirements.

The Court of Appeals affirmed. It first considered petitioner's argument that § 2254(e)(2) did not apply to his case because he had been diligent in attempting to develop his claims in state court. Citing its decision in *Cardwell* v. *Greene*, 152 F. 3d 331 (CA4), cert. denied, 525 U. S. 1037 (1998), the Court of Appeals agreed with petitioner that § 2254(e)(2) would not apply if he had exercised diligence in state court. The court held, however, that petitioner had not been diligent and so had "failed to develop" in state court the factual bases of his *Brady*, juror bias, and prosecutorial misconduct claims. See 189 F. 3d 421, 426 (CA4 1999). The Court of Appeals concluded petitioner could not satisfy the statute's conditions for excusing his failure to develop the facts and held him barred from receiving an evidentiary hearing. The Court of Appeals ruled in the alternative that, even if § 2254(e)(2) did not apply, petitioner would be ineligible for an evidentiary hearing under the cause and prejudice standard of pre-AEDPA law. See *id.*, at 428.

Addressing petitioner's claim of an undisclosed informal agreement between the Commonwealth and Cruse, the Court of Appeals rejected it on the merits under 28 U. S. C. § 2254(d)(1) and, as a result, did not consider whether § 2254(e)(2) applied. See 189 F. 3d, at 429.

On October 18, 1999, petitioner filed an application for stay of execution and a petition for a writ of certiorari. On October 28, we stayed petitioner's execution and granted certiorari to decide whether § 2254(e)(2) precludes him from receiving an evidentiary hearing on his claims. See 528 U. S. 960 (1999). We now affirm in part and reverse in part.

## II

### A

Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case. See *Lindh* v. *Murphy*, 521 U. S. 320, 326–327 (1997). The Commonwealth argues AEDPA bars petitioner from receiving an evidentiary hearing on any claim whose factual basis was not developed in state court, absent narrow circumstances not applicable here. Petitioner did not develop, or raise, his claims of juror bias, prosecutorial misconduct, or the prosecution's alleged *Brady* violation regarding Cruse's psychiatric report until he filed his federal habeas petition. Petitioner explains he could not have developed the claims earlier because he was unaware, through no fault of his own, of the underlying facts. As a consequence, petitioner contends, AEDPA erects no barrier to an evidentiary hearing in federal court.

Section 2254(e)(2), the provision which controls whether petitioner may receive an evidentiary hearing in federal district court on the claims that were not developed in the Virginia courts, becomes the central point of our analysis. It provides as follows:

> "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> "(A) the claim relies on—
>
> "(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> "(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> "(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

By the terms of its opening clause the statute applies only to prisoners who have "failed to develop the factual basis of a claim in State court proceedings." If the prisoner has failed to develop the facts, an evidentiary hearing cannot be granted unless the prisoner's case meets the other conditions of § 2254(e)(2). Here, petitioner concedes his case does not comply with § 2254(e)(2)(B), see Brief for Petitioner 25, so he may receive an evidentiary hearing only if his claims fall outside the opening clause.

There was no hearing in state court on any of the claims for which petitioner now seeks an evidentiary hearing. That, says the Commonwealth, is the end of the matter. In its view petitioner, whether or not through his own fault or neglect, still "failed to develop the factual basis of a claim in State court proceedings." Petitioner, on the other hand, says the phrase "failed to develop" means lack of diligence in developing the claims, a defalcation he contends did not occur since he made adequate efforts during state-court proceedings to discover and present the underlying facts. The Court of Appeals agreed with petitioner's interpretation of § 2254(e)(2) but believed petitioner had not exercised enough diligence to avoid the statutory bar. See 189 F. 3d, at 426. We agree with petitioner and the Court of Appeals that "failed to develop" implies some lack of diligence; but, unlike the Court of Appeals, we find no lack of diligence on petitioner's part with regard to two of his three claims.

### B

We start, as always, with the language of the statute. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989). Section 2254(e)(2) begins with a conditional clause, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings," which directs attention to the prisoner's efforts in state court. We ask first whether the factual basis was indeed developed in state court, a question susceptible, in the normal course, of a simple yes or no answer. Here the answer is no.

The Commonwealth would have the analysis begin and end there. Under its no-fault reading of the statute, if there is no factual development in the state court, the federal habeas court may not inquire into the reasons for the default when determining whether the opening clause of § 2254(e)(2) applies. We do not agree with the Commonwealth's interpretation of the word "failed."

We do not deny "fail" is sometimes used in a neutral way, not importing fault or want of diligence. So the phrase "We fail to understand his argument" can mean simply "We cannot understand his argument." This is not the sense in which the word "failed" is used here, however.

We give the words of a statute their " 'ordinary, contemporary, common meaning,' " absent an indication Congress intended them to bear some different import. *Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202, 207 (1997) (quoting *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993)). See also *Bailey* v. *United States*, 516 U. S. 137, 141 (1995). In its customary and preferred sense, "fail" connotes some omission, fault, or negligence on the part of the person who has failed to do something. See, *e. g.*, Webster's New International Dictionary 910 (2d ed. 1939) (defining "fail" as "to be wanting; to fall short; to be or become deficient in any measure or degree," and "failure" as "a falling short," "a deficiency or lack," and an "[o]mission to perform"); Webster's New International Dictionary 814 (3d ed. 1993) ("to leave some possible or expected action unperformed or some condition unachieved"). See also Black's Law Dictionary 594 (6th ed. 1990) (defining "fail" as "[f]ault, negligence, or refusal"). To say a person has failed in a duty implies he did not take the necessary steps to fulfill it. He is, as a consequence, at fault and bears responsibility for the failure. In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. Fault lies, in those circumstances, either with the person who interfered with the accomplishment of the act or with no one at all. We conclude Congress used the word "failed" in the sense just described. Had Congress intended a no-fault standard, it would have had no difficulty in making its intent plain. It would have had to do no more than use, in lieu of the phrase "has failed to," the phrase "did not."

Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel. In this we agree with the Court of Appeals and with all other courts of appeals which have addressed the issue. See, *e. g., Baja* v. *Ducharme,* 187 F. 3d 1075, 1078–1079 (CA9 1999); *Miller* v. *Champion,* 161 F. 3d 1249, 1253 (CA10 1998); *Cardwell,* 152 F. 3d, at 337; *McDonald* v. *Johnson,* 139 F. 3d 1056, 1059 (CA5 1998); *Burris* v. *Parke,* 116 F. 3d 256, 258 (CA7 1997); *Love* v. *Morton,* 112 F. 3d 131, 136 (CA3 1997).

Our interpretation of § 2254(e)(2)'s opening clause has support in *Keeney* v. *Tamayo-Reyes,* 504 U. S. 1 (1992), a case decided four years before AEDPA's enactment. In *Keeney,* a prisoner with little knowledge of English sought an evidentiary hearing in federal court, alleging his *nolo contendere* plea to a manslaughter charge was not knowing and voluntary because of inaccuracies in the translation of the plea proceedings. The prisoner had not developed the facts of his claim in state collateral proceedings, an omission caused by the negligence of his state postconviction counsel. See *id.*, at 4, 8–9. The Court characterized this as the "prisoner's failure to develop material facts in state court." *Id.*, at 8. We required the prisoner to demonstrate cause and prejudice excusing the default before he could receive a hearing on his claim, *ibid.*, unless the prisoner could "show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing," *id.*, at 12.

Section 2254(e)(2)'s initial inquiry into whether "the applicant has failed to develop the factual basis of a claim in State court proceedings" echoes *Keeney*'s language regarding "the state prisoner's failure to develop material facts in state court." In *Keeney*, the Court borrowed the cause and prejudice standard applied to procedurally defaulted claims, see *Wainwright* v. *Sykes*, 433 U. S. 72, 87–88 (1977), deciding there was no reason "to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim." *Keeney*, *supra*, at 8. As is evident from the similarity between the Court's phrasing in *Keeney* and the opening clause of § 2254(e)(2), Congress intended to preserve at least one aspect of *Keeney*'s holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing. To be sure, in requiring that prisoners who have not been diligent satisfy § 2254(e)(2)'s provisions rather than show cause and prejudice, and in eliminating a freestanding "miscarriage of justice" exception, Congress raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings. Contrary to the Commonwealth's position, however, there is no basis in the text of § 2254(e)(2) to believe Congress used "fail" in a different sense than the Court did in *Keeney* or otherwise intended the statute's further, more stringent requirements to control the availability of an evidentiary hearing in a broader class of cases than were covered by *Keeney's* cause and prejudice standard.

In sum, the opening clause of § 2254(e)(2) codifies *Keeney's* threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney's* test for excusing the deficiency in the state-court record prior to AEDPA are now controlled by § 2254(e)(2). When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary. See *Lorillard* v. *Pons*, 434 U. S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"). See also *Cottage Savings Assn.* v. *Commissioner*, 499 U. S. 554, 562 (1991).

Interpreting § 2254(e)(2) so that "failed" requires lack of diligence or some other fault avoids putting it in needless tension with § 2254(d). A prisoner who developed his claim in state court and can prove the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," is not barred from obtaining relief by § 2254(d)(1). See *Williams* v. *Taylor, ante*, at 412–413 (majority opinion). If the opening clause of § 2254(e)(2) covers a request for an evidentiary hearing on a claim which was pursued with diligence but remained undeveloped in state court because, for instance, the prosecution concealed the facts, a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim even if he could satisfy § 2254(d). See 28 U. S. C. § 2254(e)(2)(B). The "failed to develop" clause does not bear this harsh reading, which would attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court. We see no indication that Congress by this language intended to remove the distinction between a prisoner who is at fault and one who is not.

The Commonwealth argues a reading of "failed to develop" premised on fault empties § 2254(e)(2)(A)(ii) of its meaning. To treat the prisoner's lack of diligence in state court as a prerequisite for application of § 2254(e)(2), the Commonwealth contends, renders a nullity of the statute's own diligence provision requiring the prisoner to show "a factual predicate [of his claim] could not have been previously discovered through the exercise of due diligence." § 2254(e)(2)(A)(ii). We disagree.

The Commonwealth misconceives the inquiry mandated by the opening clause of § 2254(e)(2). The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful. Though lack of diligence will not bar an evidentiary hearing if efforts to discover the facts would have been in vain, see § 2254(e)(2)(A)(ii), and there is a convincing claim of innocence, see § 2254(e)(2)(B), only a prisoner who has neglected his rights in state court need satisfy these conditions. The statute's later reference to diligence pertains to cases in which the facts could not have been discovered, whether there was diligence or not. In this important respect § 2254(e)(2)(A)(ii) bears a close resemblance to (e)(2)(A)(i), which applies to a new rule that was not available at the time of the earlier proceedings. Cf. *Gutierrez* v. *Ada,* 528 U. S. 250, 255 (2000) ("[W]ords and people are known by their companions"). Cf. also *United States* v. *Locke, ante,* at 105. In these two parallel provisions Congress has given prisoners who fall within § 2254(e)(2)'s opening clause an opportunity to obtain an evidentiary hearing where the legal or factual basis of the claims did not exist at the time of state-court proceedings.

We are not persuaded by the Commonwealth's further argument that anything less than a no-fault understanding of the opening clause is contrary to AEDPA's purpose to further the principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings. See, *e. g., Coleman* v. *Thompson,* 501 U. S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus"); *McCleskey* v. *Zant,* 499 U. S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments").

It is consistent with these principles to give effect to Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus, while recognizing the statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not. Principles of exhaustion are premised upon recognition by Congress and the Court that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings. Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law. "Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 844 (1999). For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

## III

Now we apply the statutory test. If there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not "failed to develop" the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements. We find lack of diligence as to one of the three claims but not as to the other two.

### A

Petitioner did not exercise the diligence required to preserve the claim that nondisclosure of Cruse's psychiatric report was in contravention of *Brady* v. *Maryland,* 373 U. S. 83 (1963). The report concluded Cruse "ha[d] little recollection of the [murders of the Kellers], other than vague memories, as he was intoxicated with alcohol and marijuana at the time." App. 495. The report had been prepared in September 1993, before petitioner was tried; yet it was not mentioned by petitioner until he filed his federal habeas petition and attached a copy of the report. Petitioner explained that an investigator for his federal habeas counsel discovered the report in Cruse's court file but state habeas counsel had not seen it when he had reviewed the same file. State habeas counsel averred as follows:

> "Prior to filing [petitioner's] habeas corpus petition with the Virginia Supreme Court, I reviewed the Cumberland County court files of [petitioner] and of his codefendant, Jeffrey Cruse. . . . I have reviewed the attached psychiatric evaluation of Jeffrey Cruse . . . . I have no recollection of seeing this report in Mr. Cruse's court file when I examined the file. Given the contents of the report, I am confident that I would remember it." *Id.,* at 625–626.

The trial court was not satisfied with this explanation for the late discovery. Nor are we.

There are repeated references to a "psychiatric" or "mental health" report in a transcript of Cruse's sentencing proceeding, a copy of which petitioner's own state habeas counsel attached to the state habeas petition he filed with the Virginia Supreme Court. The transcript reveals that Cruse's attorney described the report with details that should have alerted counsel to a possible *Brady* claim. As Cruse's attorney said:

> "The psychiatric report . . . point[s] out that [Cruse] is significantly depressed. He suffered from post traumatic stress. His symptoms include nightmares, sleeplessness, sobbing, reddening of the face, severe depres-

> sion, flash backs . . . . [T]he psychological report states he is overwhelmed by feelings of guilt and shame in his actions. He is numb. He is trying to suppress his feelings, but when he has feelings, there is only pain and sadness." App. 424.

The description accords with the contents of the psychiatric report, which diagnosed Cruse as suffering from post-traumatic stress disorder:

> "[Cruse] has recurrent nightmares and visualizes the face of the woman that he killed. When attempting to describe this nightmare, he breaks openly into tears and his face reddens. . . . He continues to feel worthless as a person . . . . He has no hope for his future and has been thinking of suicide constantly. . . . He does describe inability to sleep, often tossing and turning, waking up, and feeling fatigued during the day. . . . He described neurovegetative symptoms of major depression and post-traumatic nightmares, recurrent in nature, of the [murders]." *Id.*, at 495–499.

The transcript put petitioner's state habeas counsel on notice of the report's existence and possible materiality. The sole indication that counsel made some effort to investigate the report is an October 30, 1995, letter to the prosecutor in which counsel requested "[a]ll reports of physical and mental examinations, scientific tests, or experiments conducted in connection with the investigation of the offense, including but not limited to: . . . [a]ll psychological test or polygraph examinations performed upon any prosecution witness and all documents referring or relating to such tests . . . ." *Id.*, at 346–347. After the prosecution declined the requests absent a court order, *id.*, at 353, it appears counsel made no further efforts to find the specific report mentioned by Cruse's attorney. Given knowledge of the report's existence and potential importance, a diligent attorney would have done more. Counsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2).

As we hold there was a failure to develop the factual basis of this *Brady* claim in state court, we must determine if the requirements in the balance of § 2254(e)(2) are satisfied so that petitioner's failure is excused. Subparagraph (B) of § 2254(e)(2) conditions a hearing upon a showing, by clear and convincing evidence, that no reasonable factfinder would have found petitioner guilty of capital murder but for the alleged constitutional error. Petitioner concedes he cannot make this showing, see Brief for Petitioner 25, and the case has been presented to us on that premise. For these reasons, we affirm the Court of Appeals' judgment barring an evidentiary hearing on this claim.

### B

We conclude petitioner has met the burden of showing he was diligent in efforts to develop the facts supporting his juror bias and prosecutorial misconduct claims in collateral proceedings before the Virginia Supreme Court.

Petitioner's claims are based on two of the questions posed to the jurors by the trial judge at *voir dire.* First, the judge asked prospective jurors, "Are any of you related to the following people who may be called as witnesses?" Then he read the jurors a list of names, one of which was "Deputy Sheriff Claude Meinhard." Bonnie Stinnett, who would later become the jury foreperson, had divorced Meinhard in 1979, after a 17-year marriage with four children. Stinnett remained silent, indicating the answer was "no." Meinhard, as the officer who investigated the crime scene and interrogated Cruse, would later become the prosecution's lead-off witness at trial.

After reading the names of the attorneys involved in the case, including one of the prosecutors, Robert Woodson, Jr., the judge asked, "Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?" Stinnett again said nothing, despite the fact Woodson had represented her during her divorce from Meinhard. App. 483, 485.

In an affidavit she provided in the federal habeas proceedings, Stinnett claimed "[she] did not respond to the judge's [first] question because [she] did not consider [herself] 'related' to Claude Meinhard in 1994 [at *voir dire*] . . . . Once our marriage ended in 1979, I was no longer related to him." *Id.*, at 627. As for Woodson's earlier representation of her, Stinnett explained as follows:

> "When Claude and I divorced in 1979, the divorce was uncontested and Mr. Woodson drew up the papers so that the divorce could be completed. Since neither Claude nor I was contesting anything, I didn't think Mr. Woodson 'represented' either one of us." *Id.*, at 628.

Woodson provided an affidavit in which he admitted "[he] was aware that Juror Bonnie Stinnett was the ex-wife of then Deputy Sheriff Claude Meinhard and [he] was aware that they had been divorced for some time." *Id.*, at 629. Woodson stated, however, "[t]o [his] mind, people who are related only by marriage are no longer 'related' once the marriage ends in divorce." *Ibid.* Woodson also "had no recollection of having been involved as a private attorney in the divorce proceedings between Claude Meinhard and Bonnie Stinnett." *Id.*, at 629–630. He explained that "[w]hatever [his] involvement was in the 1979 divorce, by the time of trial in 1994 [he] had completely forgotten about it." *Id.*, at 630.

Even if Stinnett had been correct in her technical or literal interpretation of the question relating to Meinhard, her silence after the first question was asked could suggest to the finder of fact an unwillingness to be forthcoming; this in turn could bear on the veracity of her explanation for not disclosing that Woodson had been her attorney. Stinnett's failure to divulge material information in response to the second question was misleading as a matter of fact because, under any interpretation, Woodson had acted as counsel to her and Meinhard in their divorce. Coupled with Woodson's own reticence, these omissions as a whole disclose the need for an evidentiary hearing. It may be that petitioner could establish that Stinnett was not impartial, see *Smith* v. *Phillips*, 455 U. S. 209, 217, 219–221 (1982), or that Woodson's silence so infected the trial as to deny due process, see *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 647–648 (1974).

In ordering an evidentiary hearing on the juror bias and prosecutorial misconduct claims, the District Court concluded the factual basis of the claims was not reasonably available to petitioner's counsel during state habeas proceedings. After the Court of Appeals vacated this judgment, the District Court dismissed the petition and the Court of Appeals affirmed under the theory that state habeas counsel should have discovered Stinnett's relationship to Meinhard and Woodson. See 189 F. 3d, at 428.

We disagree with the Court of Appeals on this point. The trial record contains no evidence which would have put a reasonable attorney on notice that Stinnett's nonresponse was a deliberate omission of material information. State habeas counsel did attempt to investigate petitioner's jury, though prompted by concerns about a different juror. App. 388–389. Counsel filed a motion for expert services with the Virginia Supreme Court, alleging "irregularities, improprieties and omissions exist[ed] with respect to the empaneling *[sic]* of the jury." *Id.*, at 358. Based on these suspicions, counsel requested funding for an investigator "to examine all circumstances relating to the empanelment of the jury and the jury's consideration of the case." *Ibid.* The Commonwealth opposed the motion, and the Virginia Supreme Court denied it and dismissed the habeas petition, depriving petitioner of a further opportunity to investigate. The Virginia Supreme Court's denial of the motion is understandable in light of petitioner's vague allegations, but the vagueness was not the fault of petitioner. Counsel had no reason to believe Stinnett had been married to Meinhard or been represented by Woodson. The underdevelopment of these matters was attributable to Stinnett and Woodson, if anyone. We do not suggest the State has an obligation to pay for investigation of as yet undeveloped claims; but if the prisoner has made a reasonable effort to discover the claims to commence or continue state proceedings, § 2254(e)(2) will not bar him from developing them in federal court.

The Court of Appeals held state habeas counsel was not diligent because petitioner's investigator on federal habeas discovered the relationships upon interviewing two jurors who referred in passing to Stinnett as "Bonnie Meinhard." See Brief for Petitioner 35. The investigator later confirmed Stinnett's prior marriage to Meinhard by checking Cumberland County's public records. See 189 F. 3d, at 426 ("The documents supporting [petitioner's] Sixth Amendment claims have been a matter of public record since Stinnett's divorce became final in 1979. Indeed, because [petitioner's] federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well"). We should be surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror. Because of Stinnett and Woodson's silence, there was no basis for an investigation into Stinnett's marriage history. Section 2254(e)(2) does not apply to petitioner's related claims of juror bias and prosecutorial misconduct.

We further note the Commonwealth has not argued that petitioner could have sought relief in state court once he discovered the factual bases of these claims some time between appointment of federal habeas counsel on July 2, 1996, and the filing of his federal habeas petition on November 20, 1996. As an indigent, petitioner had 120 days following appointment of state habeas counsel to file a petition with the Virginia Supreme Court. Va. Code Ann. § 8.01–654.1 (1999). State habeas counsel was appointed on August 10, 1995, about a year before petitioner's investigator on federal habeas uncovered the information regarding Stinnett and Woodson. As state postconviction relief was no longer available at the time the facts came to light, it would have been futile for petitioner to return to the Virginia courts. In these circumstances, though the state courts did not have an opportunity to consider the new claims, petitioner cannot be said to have failed to develop them in state court by reason of having neglected to pursue remedies available under Virginia law.

Our analysis should suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance. Questions regarding the standard for determining the prejudice that petitioner must establish to obtain relief on these claims can be addressed by the Court of Appeals or the District Court in the course of further proceedings. These courts, in light of cases such as *Smith, supra,* at 215 ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"), will take due account of the District Court's earlier decision to grant an evidentiary hearing based in part on its belief that "Juror Stinnett deliberately failed to tell the truth on voir dire." *Williams* v. *Netherland,* Civ. Action No. 3:96CV529 (ED Va., Apr. 13, 1998), App. 529, 557.

## IV

Petitioner alleges the Commonwealth failed to disclose an informal plea agreement with Cruse. The Court of Appeals rejected this claim on the merits under § 2254(d)(1), so it is unnecessary to reach the question whether § 2254(e)(2) would permit a hearing on the claim.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

# EDWARDS, WARDEN *v.* CARPENTER

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98–2060. Argued February 28, 2000—Decided April 25, 2000

Respondent pleaded guilty while maintaining his innocence to Ohio murder and robbery charges in exchange for the prosecutor's agreement that the plea could be withdrawn if the death penalty was imposed. The Ohio Court of Appeals affirmed his conviction and sentence of imprisonment, and he did not appeal to the Ohio Supreme Court. After pursuing state postconviction relief *pro se*, respondent, represented by new counsel, petitioned the Ohio Court of Appeals to reopen his direct appeal, claiming that his original appellate counsel was constitutionally ineffective in failing to challenge the sufficiency of the evidence supporting his conviction and sentence. The court dismissed the application as untimely under Ohio Rule of Appellate Procedure 26(B), and the Ohio Supreme Court affirmed. Respondent then filed a federal habeas petition, raising, *inter alia,* the sufficiency-of-the-evidence claim, and alleging that his appellate counsel was constitutionally ineffective in not raising that claim on direct appeal. The District Court found that his ineffective-assistance-of-counsel claim was cause excusing the procedural default of his sufficiency-of-the-evidence claim because Rule 26(B) was not an adequate procedural ground to bar federal review of the ineffective-assistance claim; concluded that respondent's appellate counsel was constitutionally ineffective; and granted the writ conditioned on the state appellate court's reopening of respondent's direct appeal of the sufficiency-of-the-evidence claim. On cross-appeals, the Sixth Circuit held that the ineffective-assistance claim served as cause to excuse the default of the sufficiency-of-the-evidence claim, whether or not the former claim had been procedurally defaulted, because respondent had exhausted the ineffective-assistance claim by presenting it to the state courts in his application to reopen the direct appeal. Finding prejudice from counsel's failure to raise the sufficiency-of-the-evidence claim on direct appeal, it directed the District Court to issue the writ conditioned upon the state court's according respondent a new culpability hearing.

*Held:* A procedurally defaulted ineffective-assistance claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective-assistance claim itself. The procedural default doctrine and its attendant "cause and prejudice" standard are grounded in comity and federalism concerns, *Coleman* v. *Thompson*, 501 U. S. 722, 730, and apply whether the default occurred at trial, on appeal, or on state collateral attack, *Murray* v. *Carrier*, 477 U. S. 478, 490–492. Thus, a prisoner must demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider that claim's merits. 501 U. S., at 750. Counsel's ineffectiveness in failing properly to preserve a claim for state-court review will suffice as cause, but only if that ineffectiveness itself constitutes an independent constitutional claim. *Carrier, supra*, at 488–499. The comity and federalism principles underlying the doctrine of exhaustion of state remedies require an ineffective-assistance claim to be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. *Carrier, supra*, at 489. The doctrine's purposes would be frustrated if federal review were available to a prisoner who had *presented* his claim in state court, but in such a manner that the state court could not, under its procedural rules, have entertained it. Pp. 450–454.

163 F. 3d 938, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 454.

*Edward B. Foley*, State Solicitor of Ohio, argued the cause for petitioner. With him on the briefs were *Betty D. Montgomery*, Attorney General, *David M. Gormley*, and *Stephen P. Carney*.

*J. Joseph Bodine, Jr.*, argued the cause for respondent. With him on the brief were *David H. Bodiker*, *Laurence E. Komp*, and *Angela Wilson Miller*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Texas et al. by *John Cornyn*, Attorney General of Texas, *Andy Taylor*, First Assistant Attorney General, *Shane Phelps*, Deputy Attorney General for Criminal Justice, *Gregory S. Coleman*, Solicitor General, *Idolina G. McCullough*, Assistant Solicitor General, *Michael E. McLachlan*, Solicitor General of Colorado, and *John M. Bailey*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Mark Pryor* of Arkansas, *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Ken*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as "cause" for the procedural default of another claim when the ineffective-assistance claim has itself been procedurally defaulted.

## I

Respondent was indicted by an Ohio grand jury for aggravated murder and aggravated robbery. He entered a guilty plea while maintaining his innocence—a procedure we held to be constitutional in *North Carolina* v. *Alford,* 400 U. S. 25 (1970)—in exchange for the prosecution's agreement that the guilty plea could be withdrawn if the three-judge panel that accepted it elected, after a mitigation hearing, to impose the death penalty. The panel accepted respondent's plea based on the prosecution's recitation of the evidence supporting the charges and, following a mitigation hearing, sentenced him to life imprisonment with parole eligibility after 30 years on the aggravated-murder count and to a concurrent term of 10 to 25 years on the aggravated-robbery count. On direct appeal respondent, represented by new counsel, assigned only the single error that the evidence offered in mitigation established that he should have been

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*Salazar* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *John J. Farmer, Jr.*, of New Jersey, *Patricia A. Madrid* of New Mexico, *W. A. Drew Edmondson* of Oklahoma, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin.

eligible for parole after 20 rather than 30 years. The Ohio Court of Appeals affirmed, and respondent did not appeal to the Ohio Supreme Court.

After unsuccessfully pursuing state postconviction relief *pro se,* respondent, again represented by new counsel, filed an application in the Ohio Court of Appeals to reopen his direct appeal, pursuant to Ohio Rule of Appellate Procedure 26(B),[1] on the ground that his original appellate counsel was constitutionally ineffective in failing to raise on direct appeal a challenge to the sufficiency of the evidence. The appellate court dismissed the application because respondent had failed to show, as the rule required, good cause for filing after the 90-day period allowed.[2] The Ohio Supreme Court, in a one-sentence *per curiam* opinion, affirmed. *State* v. *Carpenter,* 74 Ohio St. 3d 408, 659 N. E. 2d 786 (1996).

On May 3, 1996, respondent filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio, alleging, *inter alia,* that the evidence supporting his plea and sentence was insufficient, in violation of the Fifth and Fourteenth Amendments, and that his appellate counsel was constitutionally ineffective in failing to raise that claim on direct appeal. Concluding that respondent's sufficiency-of-the-evidence claim was procedurally defaulted, the District Court considered next whether the ineffective-assistance-of-counsel claim could serve as cause excusing that default. The District Court acknowledged that the ineffective-assistance claim had been dismissed on procedural grounds, but concluded that Rule 26(B)'s inconsistent application by the Ohio courts rendered it inadequate to bar federal habeas review. See *Ford* v. *Georgia,* 498 U. S. 411, 423–424 (1991) (state procedural default is not an "independent and adequate state ground" barring subsequent federal review unless the state rule was " 'firmly established and regularly followed' " at the time it was applied). Proceeding to the merits of the ineffective-assistance claim, the District Court concluded that respondent's appellate counsel was constitutionally ineffective under the test established in *Strickland* v. *Washington,* 466 U. S. 668 (1984), and granted the writ of habeas corpus conditioned on the state appellate court's reopening of respondent's direct appeal of the sufficiency-of-the-evidence claim.

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[1] Rule 26(B) provides, in relevant part:

"(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

[2] Respondent filed his application to reopen on July 15, 1994. Although Rule 26(B) did not become effective until July 1, 1993, more than two years after respondent's direct appeal was completed, the Court of Appeals considered respondent's time for filing to have begun on the Rule's effective date and to have expired 90 days thereafter.

On cross-appeals, the United States Court of Appeals for the Sixth Circuit held that respondent's ineffective-assistance-of-counsel claim served as "cause" to excuse the procedural default of his sufficiency-of-the-evidence claim, whether or not the ineffective-assistance claim itself had been procedurally defaulted. *Carpenter* v. *Mohr,* 163 F. 3d 938 (CA6 1998). In the panel's view, it sufficed that respondent had exhausted the ineffective-assistance claim by presenting it to the state courts in his application to reopen the direct appeal, even though that application might, under Ohio law, have been time barred. Finding in addition prejudice from counsel's failure to raise the sufficiency-of-the-evidence claim on direct appeal, the Sixth Circuit directed the District Court to issue the writ of habeas corpus conditioned upon the state court's according respondent a new culpability hearing. We granted certiorari. 528 U. S. 985 (1999).

## II

Petitioner contends that the Sixth Circuit erred in failing to recognize that a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective-assistance claim itself. We agree.

The procedural default doctrine and its attendant "cause and prejudice" standard are "grounded in concerns of comity and federalism," *Coleman* v. *Thompson*, 501 U. S. 722, 730 (1991), and apply alike whether the default in question occurred at trial, on appeal, or on state collateral attack, *Murray* v. *Carrier*, 477 U. S. 478, 490–492 (1986). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U. S., at 732. We therefore require a prisoner to demonstrate cause for his state-court default of *any* federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim. *Id.*, at 750. The one exception to that rule, not at issue here, is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice. *Ibid.*

Although we have not identified with precision exactly what constitutes "cause" to excuse a procedural default, we have acknowledged that in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice. *Carrier*, 477 U. S., at 488–489. Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. *Ibid.* In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim. And we held in *Carrier* that the principles of comity and federalism that underlie our longstanding exhaustion doctrine—then as now codified in the federal habeas statute, see 28 U. S. C. §§ 2254(b), (c)—require *that* constitutional claim, like others, to be first raised in state court. "[A] claim of ineffective assistance," we said, generally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier, supra,* at 489.

The question raised by the present case is whether *Carrier*'s exhaustion requirement for claims of ineffective assistance asserted as cause is uniquely immune from the procedural-default rule that accompanies the exhaustion requirement in all other contexts—whether, in other words, it suffices that the ineffective-assistance claim was "presented" to the state courts, even though it was not presented in the manner that state law requires. That is not a hard question. An affirmative answer would render *Carrier*'s exhaustion requirement illusory.[3]

We recognized the inseparability of the exhaustion rule and the procedural-default doctrine in *Coleman:* "In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." 501 U. S., at 732. We again considered the interplay between exhaustion and procedural default last Term in *O'Sullivan* v. *Boerckel*, 526 U. S. 838 (1999), concluding that the latter doctrine was necessary to " 'protect the integrity' of the federal exhaustion rule." *Id.*, at 848 (quoting *id.*, at 853 (STEVENS, J., dissenting)). The purposes of the exhaustion requirement, we said, would be utterly defeated if the prisoner were able to obtain federal habeas review simply by " 'letting the time run' " so that state remedies were no longer available. *Id.*, at 848. Those purposes would be no less frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it. In such circumstances, though the prisoner would have "concededly exhausted his state remedies," it could hardly be said that, as comity and federalism require, the State had been given a "*fair* 'opportunity to pass upon [his claims].' " *Id.*, at 854 (STEVENS, J., dissenting) (emphasis added) (quoting *Darr* v. *Burford*, 339 U. S. 200, 204 (1950)).

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[3] Last Term, in a *per curiam* summary reversal, we clearly expressed the view that a habeas petitioner must satisfy the "cause and prejudice" standard before his procedurally defaulted ineffective-assistance claim will excuse the default of another claim. *Stewart* v. *LaGrand,* 526 U. S. 115, 120 (1999). Respondent contends that we are not bound by *LaGrand* because in that case the habeas petitioner had *waived* his ineffective-assistance claim in the District Court, thereby rendering our procedural default discussion dicta, and because, in any event, *per curiam* opinions decided without the benefit of full briefing or oral argument are of little precedential value. Whether our procedural default analysis in *LaGrand* is properly characterized as dictum or as alternative holding, and whatever the precedential value of a *per curiam* opinion, the ease with which we so recently resolved this identical question reflects the degree to which the proper resolution flows irresistibly from our precedents.

To hold, as we do, that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that that procedural default may not *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim. Indeed, the Sixth Circuit may well conclude on remand that respondent can meet that standard in this case (although we should note that respondent has not argued that he can, preferring instead to argue that he does not have to). Or it may conclude, as did the District Court, that Ohio Rule of Appellate Procedure 26(B) does not constitute an adequate procedural ground to bar federal habeas review of the ineffective-assistance claim. We express no view as to these issues, or on the question whether respondent's appellate counsel was constitutionally ineffective in not raising the sufficiency-of-the-evidence claim in the first place.

* * *

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BREYER, with whom JUSTICE STEVENS joins, concurring in the judgment.

I believe the Court of Appeals correctly decided the basic question: "Whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as 'cause' for the procedural default of another claim when the ineffective-assistance claim is itself procedurally defaulted." The question's phrasing itself reveals my basic concern. Although the question, like the majority's opinion, is written with clarity, few lawyers, let alone unrepresented state prisoners, will readily understand it. The reason lies in the complexity of this Court's habeas corpus jurisprudence—a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure. Today's decision unnecessarily adds to that complexity and cannot be reconciled with our consistent recognition that the determination of "cause" is a matter for the federal habeas judge.

To explain why this is so, and at the risk of oversimplification, I must reiterate certain elementary ground rules. A federal judge may issue a writ of habeas corpus freeing a state prisoner, if the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a). However, the judge may not issue the writ if an adequate and independent state-law ground justifies the prisoner's detention, regardless of the federal claim.

See *Wainwright* v. *Sykes,* 433 U. S. 72, 81–88 (1977). One "state ground" often asserted as an adequate, independent basis for holding a state prisoner in custody is a state-law "procedural default," such as the prisoner's failure to raise his federal claim at the proper time. However, under certain conditions the State's assertion of such a ground is not "adequate" (and consequently does not bar assertion of the federal-law claim). There are three situations in which an otherwise valid state ground will not bar federal claims: (1) where failure to consider a prisoner's claims will result in a "fundamental miscarriage of justice," *Coleman* v. *Thompson,* 501 U. S. 722, 750 (1991); (2) where the state procedural rule was not " 'firmly established and regularly followed,' " *Ford* v. *Georgia,* 498 U. S. 411, 423–424 (1991); *James* v. *Kentucky,* 466 U. S. 341, 348–349 (1984); and (3) where the prisoner had good "cause" for not following the state procedural rule and was "prejudice[d]" by not having done so, *Sykes, supra,* at 87.

Ordinarily, a federal habeas judge, while looking to state law to determine the potential existence of a procedural ground that might bar consideration of the prisoner's federal claim, decides whether such a ground is *adequate* as a matter of federal law. See *Ford, supra; James, supra; Coleman, supra.* Thus the Court has applied federal standards to determine whether there has been a "fundamental miscarriage of justice." See, *e. g., Schlup* v. *Delo,* 513 U. S. 298, 314–317 (1995). And the Court has also looked to state practice to determine the factual circumstances surrounding the application of a state procedural rule, while determining as a matter of federal law whether that rule is "firmly established [and] regularly followed." *Ford, supra,* at 424–425. Federal habeas courts would normally determine whether "cause and prejudice" excuse a "procedural default" in the same manner. *Murray* v. *Carrier,* 477 U. S. 478, 489 (1986) ("[T]he question of cause" is "a question of federal law").

If I could stop here, the rules would be complicated, but still comprehensible. The federal habeas judge would look to state law and state practice to determine the facts and circumstances surrounding a state procedural rule that the State claims is an "adequate and independent state ground." However, the federal judge would determine the adequacy of that "state ground" as a matter of federal law.

Unfortunately, the rules have become even more complex. In *Carrier*, the Court considered a prisoner's contention that he had "cause" for failing to follow a state procedural rule—a rule that would have barred his federal claim. The "cause," in the prisoner's view, was that his lawyer (who had failed to follow the state procedural rule) had performed inadequately. This Court determined, as a matter of federal law, that only a performance so inadequate that it violated the defendant's Sixth Amendment right to effective assistance of counsel could amount to "cause" sufficient to overcome a "procedural default." *Id.*, at 488–489. That being so, the Court reasoned, the prisoner should have to exhaust the ineffectiveness claim in state court. The Court wrote:

> "[I]f a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available." *Id.*, at 489.

And today the Court holds not only that the prisoner must exhaust this claim by presenting it to the state courts, but also that his failure to do so properly, *i. e.*, a failure to comply with the State's rules for doing so, bars that prisoner from ever asserting that claim as a "cause" for not having complied with state procedural rules.

The opinion in *Carrier* raises a special kind of "exhaustion" problem. The Court considered a type of "cause" ("ineffective assistance") for not following the state procedural rule that happened itself independently to constitute a violation of the Federal Constitution. After all, were the prisoner to prove his claim (*i. e.*, show "ineffective assistance"), the State might want to take action first. Ordinary exhaustion rules assure States an initial opportunity to pass upon claims of violation of the Federal Constitution. Why should a State not have a similar opportunity in this situation? As the *Carrier* Court pointed out, it would be "anomalous" for a federal habeas court to "adjudicat[e] an unexhausted constitutional claim for which state court review might still be available." *Ibid.*

The anomaly disappears, however, once the prisoner has exhausted his "ineffective-assistance" claim (which appeared in the guise of a "cause"). And there is no other anomaly that requires the majority's result. Once a claim of ineffective assistance of counsel has been exhausted—either through presentation in the state courts or through procedural default—there is no difference between that claim and any other claim of "cause" for the prisoner's original procedural default. The federal habeas court is no longer in the "anomalous position" of considering as cause an independent claim that might yet be considered by the state courts, for there is no longer any possibility that the state courts will consider the claim. There is thus no more reason to hold that procedural default of an ineffective-assistance claim bars the prisoner from raising that ineffective-assistance claim as a "cause" (excusing a different procedural default asserted as a bar to a basic constitutional claim) than there is to bar any other claim of "cause" on grounds of procedural default. The majority creates an anomaly; it does not cure one.

The added complexity resulting from the Court's opinion is obvious. Consider a prisoner who wants to assert a federal constitutional claim (call it FCC). Suppose the State asserts as a claimed "adequate and independent state ground" the prisoner's failure to raise the matter on his first state-court appeal. Suppose further that the prisoner replies by alleging that he had "cause" for not raising the matter on appeal (call it C). After *Carrier*, if that alleged "cause" (C) consists of the claim "my attorney was constitutionally ineffective," the prisoner must have exhausted C in the state courts first. And after today, if he did not follow state rules for presenting C to the state courts, he will have lost his basic claim, FCC, forever. But, I overstate. According to the opinion of the Court, he will not necessarily have lost FCC forever *if* he had "cause" for not having followed those state rules (*i. e.*, the rules for determining the existence of "cause" for not having followed the state rules governing the basic claim, FCC) (call this "cause" C*). *Ante*, at 453. The prisoner could therefore still obtain relief if he could demonstrate the merits of C*, C, and FCC.

I concede that this system of rules has a certain logic, indeed an attractive power for those who like difficult puzzles. But I believe it must succumb to this question: *Why* should a prisoner, who may well be proceeding *pro se*, lose his basic claim because he runs afoul of state procedural rules governing the presentation to state courts of the "cause" for his not having followed state procedural rules for the presentation of his basic federal claim? And, in particular, *why* should that special default rule apply when the "cause" at issue is an "ineffective-assistance-of-counsel" claim, but not when it is any of the many other "causes" or circumstances that might excuse a failure to comply with state rules? I can find no satisfactory answer to these questions.

I agree with the majority, however, that this case must be returned to the Court of Appeals. Although the prisoner's "ineffective-assistance" claim is not barred, he still must prove that the "assistance" he received was "ineffective" (or some other "cause"). And, if he does so, he still must prove his basic claim that his trial violated the Federal Constitution—all before he can secure habeas relief. I would remand for consideration of these matters.

For these reasons, I concur in the judgment.

# NELSON *v.* ADAMS USA, INC., ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 99–502. Argued March 27, 2000—Decided April 25, 2000

Ohio Cellular Products Corporation (OCP) sued respondent Adams USA, Inc. (Adams), for patent infringement. The District Court dismissed OCP's claim and ordered OCP to pay Adams' costs and attorney fees. In awarding costs and fees, the court determined that petitioner Nelson, president and sole shareholder of OCP, had deceitfully withheld from the United States Patent and Trademark Office prior art that rendered OCP's patents invalid, and that this behavior constituted inequitable conduct chargeable to OCP. Fearing that OCP might be unable to pay the fee, Adams moved under Rule 15 of the Federal Rules of Civil Procedure to amend its pleading to add Nelson, personally, as a party from whom fees could be collected. Adams also asked the court, under Rule 59(e), to amend the judgment to make Nelson immediately liable for the fee award. The District Court granted Adams' motion in full. In affirming the judgment entered against Nelson, the Federal Circuit acknowledged that it was "uncommon" to add a party after the entry of judgment. Nevertheless, Nelson had not demonstrated prejudice, the Court of Appeals concluded, because he made no showing that anything different or additional would have been done to stave off the judgment had he been a party, in his individual capacity, from the outset. That court, over a vigorous dissent, was apparently satisfied that the District Court's simultaneous allowance of the pleading amendment and entry of judgment satisfied due process.

*Held:* The District Court erred in amending the judgment immediately upon permitting amendment of the pleading. Due process, as reflected in Rule 15 as well as Rule 12, required that Nelson be given an opportunity to respond and contest his personal liability for the fee award after he was made a party and before the entry of judgment against him. Pp. 465–472.

(a) Nelson was never afforded a proper opportunity to respond to the claim against him, but was adjudged liable the very first moment his personal liability was legally at issue. The Federal Circuit observed that as long as no undue prejudice is shown, due process is met if Rule 15's requirements for amended pleadings are met. But the requirements of Rule 15 were not met here, and due process does not countenance such swift passage from pleading to judgment in the pleader's favor. Because the propriety of allowing a pleading alteration depends not only on the state of affairs prior to amendment but also on what happens afterwards, Rule 15 both conveys the circumstances under which leave to amend shall be granted and directs how the litigation will move forward following an amendment. When a court grants leave to amend to add an adverse party after the time for responding to the original pleading has lapsed, Rule 15(a) gives the party so added "10 days after service of the amended pleading" to plead in response. This opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to original pleadings secured under Rule 12(a)(1). Thus, Rule 15 assumes an amended pleading will be filed and anticipates service of that pleading on the adverse party. Nelson was never served with an amended pleading. Indeed, no such pleading was ever actually composed and filed in court. Nor, after the amendment joining Nelson, was he accorded time to state his defenses against personal liability for costs and fees. Instead, judgment was entered against him the moment permission to amend the pleading was granted. Appeal after judgment, in the circumstances this case presents, did not provide an adequate opportunity to defend against the imposition of liability. Cf. *American Surety Co.* v. *Baldwin*, 287 U. S. 156. Nothing in the record indicates that Nelson affirmatively relinquished his right to respond on the merits of the case belatedly stated against him in his individual capacity. That Nelson knew as soon as Adams moved to amend the pleading and alter the judgment that he might ultimately be subjected to personal liability does not mean that he in fact had a fair chance, before alteration of the judgment, to respond and be heard. Rule 15 and the due process for which it provides demand a more reliable and orderly course. First, as Rule 15(a) indicates, pleading in response to an amended complaint is a prerogative of parties, and Nelson was not a party prior to the District Court's ruling on Adams' motion to amend. Second, as Rule 15 further prescribes, the clock on an added party's time to respond does not start running until the new pleading naming that party is served, just as the clock on an original party's time to respond does not start running until the original pleading is served, see Rule 12(a)(1)(A). This is not to say that Rule 15 is itself a constitutional requirement. Beyond doubt, however, a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served. Pp. 465–468.

(b) Adams' arguments that Nelson waived his objections to the swift process of the District Court are rejected. First, the assertion that Nelson waived personal jurisdiction and absence-of-service arguments is beside the point because Nelson's winning argument is based neither on personal jurisdiction nor on service of process. Second, the submission that Nelson waived the due process issues presented here is unavailing because his counsel explained in the Federal Circuit that the core of Nelson's argument was the fundamental unfairness of imposing judgment without going through the litigation process the Rules prescribe. Further, both the majority and the dissent below understood that an issue before them concerned the process due after Adams' post-judgment motion. Also rejected is Adams' essential position that there was sufficient identity between Nelson and OCP to bind Nelson, without further ado, to a judgment already entered against OCP. Because Nelson, as president and sole shareholder of OCP, had withheld prior art from the Patent Office, had actual notice that Adams was seeking to collect a fee award from OCP, was the "effective controller" of the litigation for OCP, and had personally participated as a witness at the hearing on whether OCP had engaged in inequitable conduct, the Federal Circuit concluded that nothing different or additional would have been done had Nelson been a party from the outset. Judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated. The decision here does not insulate Nelson from liability, but simply ensures him the right, afforded by due process, to contest on the merits his personal liability for fees originally sought and awarded solely against OCP. Pp. 469–472.

175 F. 3d 1343, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

*Debra J. Dixon* argued the cause for petitioner. With her on the briefs was *James L. Deese.*

*Jack Allen Wheat* argued the cause for respondents. With him on the brief were *Vance Armentrout Smith, Joel Thomas Beres,* and *John William Scruton.*

JUSTICE GINSBURG delivered the opinion of the Court.

This litigation began when Ohio Cellular Products Corporation (OCP) sued respondent Adams USA, Inc. (Adams), claiming patent infringement. The District Court eventually dismissed OCP's claim and ordered OCP to pay Adams' costs and attorney fees. Adams feared that OCP might be unable to pay the fee award and therefore sought a means to recover from petitioner Nelson, president and sole shareholder of OCP, in his individual capacity. In pursuit of that objective, Adams moved under Rule 15 of the Federal Rules of Civil Procedure to amend its pleading to add Nelson as a party; Adams also asked the court, under Rule 59(e), to amend the fee award. The District Court granted the motion in full, simultaneously making Nelson a party and subjecting him to judgment. The Court of Appeals affirmed. We hold that the District Court erred in amending the judgment immediately upon permitting amendment of the pleading. Due process, as reflected in Rule 15 as well as Rule 12, required that Nelson be given an opportunity to respond and contest his personal liability for the award after he was made a party and before the entry of judgment against him.

## I

OCP and its successor corporation held two patents relating to the method of manufacturing a foamed padding used in athletic equipment. In 1994, OCP sued Adams for infringement. Adams maintained that the patents had been anticipated by prior art and were therefore invalid under 35 U. S. C. § 102(b). The District Court ruled in Adams' favor and dismissed the infringement complaint.

Adams then moved for attorney fees and costs. The District Court granted the motion on the ground that Nelson, who was at all relevant times president and sole shareholder of OCP, had deceitfully withheld the prior art from the United States Patent and Trademark Office. This behavior, the District Court concluded, constituted inequitable conduct chargeable to OCP. On January 20, 1998, the District Court awarded Adams costs and fees in the amount of $178,888.51 against OCP.

Adams feared, however, that it would be unable to collect the award. This was an altogether understandable concern; it stemmed from a letter OCP's counsel had sent Adams warning that OCP would be liquidated if exposed to a judgment for fees more than nominal in amount. Adams therefore moved to amend its pleading to add Nelson, personally, as a party from whom fees could be collected. In this postjudgment endeavor, Adams reasoned that Nelson was the flesh-and-blood party behind OCP, the person whose conduct in withholding prior art precipitated the fee award, and a person with funds sufficient to satisfy that award. The District Court granted the motion.

Adams' motion, however, sought more than permission to amend the pleading. It sought simultaneously an amended judgment, subjecting Nelson to liability as soon as he was made a party. See Record, Doc. No. 126, p. 1 ("Defendants [*i. e.*, Adams] hereby move the Court . . . for an order granting Defendants leave to amend their third party complaint to name Donald E. Nelson (Nelson) as a third party defendant in his individual capacity, and amending the judgment in this action to include Nelson as an additional party against whom judgment is entered."). In presenting the motion, Adams offered no reason why the judgment should be altered immediately. See *id.*, at 7–8. The motion did contend that an amendment to the judgment was "necessary to prevent manifest injustice," *id.*, at 8 (internal quotation marks omitted), but it did not explain why Nelson, once joined as a party, should not be permitted to state his side of that argument. The District Court seems not to have paused over this question, for it allowed the pleading amendment and altered the judgment at a single stroke. Record, Doc. No. 131. The memorandum explaining the District Court's decision addressed only the propriety of adding Nelson as a party. It did not address the propriety of altering the judgment at the very same time. Record, Doc. No. 130, at 3–7.

The Court of Appeals for the Federal Circuit affirmed the amended judgment against Nelson. *Ohio Cellular Prods. Corp.* v. *Adams USA, Inc.*, 175 F. 3d 1343 (1999). It was "uncommon," the appeals court acknowledged, to add a party after the entry of judgment. *Id.*, at 1348. The court concluded, however, that Nelson had not been prejudiced by the postjudgment joinder. The Federal Circuit based that conclusion on Nelson's failure to show that "anything different or additional would have been done" to stave off the judgment had Nelson been a party, in his individual capacity, from the outset of the litigation. *Id.*, at 1351. The panel, over a vigorous dissent by Judge Newman, was apparently satisfied that adding Nelson as a party and simultaneously amending the judgment to obligate him individually met due process requirements. See *id.*, at 1345, 1349, n. 5.

We granted certiorari, 528 U. S. 1018 (1999). In his request for this Court's review, Nelson did not dispute the portion of the District Court's order that granted Adams leave to amend its pleading to add Nelson as a party against whom costs and fees were sought. Pet. for Cert. 11. What he does challenge, and what is now before us, is the portion of the District Court's order that immediately adjudged Nelson personally liable the moment he was made a party.

## II

### A

The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees. Cf. Fed. Rule Civ. Proc. 1 (Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."). Rule 15 sets out the requirements for amended and supplemental pleadings. On that score, the Court of Appeals observed that as long as no undue prejudice is shown, "due process requirements are met if the requirements of Rule 15 are met." 175 F. 3d, at 1349, n. 5. But in the instant case, the requirements of Rule 15 were not met. As Judge Newman recognized in her dissent below, due process does not countenance such swift passage from pleading to judgment in the pleader's favor. See *id.*, at 1352.

The propriety of allowing a pleading alteration depends not only on the state of affairs prior to amendment but also on what happens afterwards. Accordingly, Rule 15 both conveys the circumstances under which leave to amend shall be granted and directs how the litigation will move forward following an amendment. When a court grants leave to amend to add an adverse party after the time for responding to the original pleading has lapsed, the party so added is given "10 days after service of the amended pleading" to plead in response. Fed. Rule Civ. Proc. 15(a). This opportunity to respond, fundamental to due process, is the echo of the opportunity to respond to original pleadings secured by Rule 12. See Fed. Rule Civ. Proc. 12(a)(1). Thus, Rule 15 assumes an amended pleading will be filed and anticipates service of that pleading on the adverse party.

Nelson was never served with an amended pleading. Indeed, no such pleading was ever actually composed and filed in court. Nor, after the amendment naming him as a party, was Nelson accorded 10 days to state his defenses against personal liability for costs and fees. Instead, judgment was entered against him the moment permission to amend the pleading was granted. Appeal after judgment, in the circumstances this case presents, did not provide an adequate opportunity to defend against the imposition of liability. Cf. *American Surety Co.* v. *Baldwin,* 287 U. S. 156 (1932). Adams points to nothing in the record indicating that Nelson affirmatively relinquished his right to respond on the merits of the case belatedly stated against him in his individual capacity. Accordingly, the proceedings did not comply with Rule 15, and neither did they comport with due process. See, *e. g., Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 314 (1950) ("'The fundamental requisite of due process of law is the opportunity to be heard.'") (quoting *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914)).

It is true that Nelson knew as soon as Adams moved to amend the pleading and alter the judgment that he might ultimately be subjected to personal liability. One could ask, therefore, whether Nelson in fact had a fair chance, before alteration of the judgment, to respond and be heard. Rule 15 and the due process for which it provides, however, demand a more reliable and orderly course. First, as the Rule indicates, pleading in response to an amended complaint is a prerogative of parties, see Fed. Rule Civ. Proc. 15(a), and Nelson was not a party prior to the District Court's ruling on Adams' motion to amend. Second, as Rule 15 further prescribes, the clock on an added party's time to respond does not start running until the new pleading naming that party is served, see *ibid.*, just as the clock on an original party's time to respond does not start running until the original pleading is served, see Fed. Rule Civ. Proc. 12(a)(1)(A). This is not to say that Rule 15 is itself a constitutional requirement. Beyond doubt, however, a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served.[1]

In support of its holding that Nelson was not prejudiced when added as a party and subjected to judgment, the Federal Circuit relied on its prior decision in *Fromson* v. *Citiplate, Inc.*, 886 F. 2d 1300 (1989). See 175 F. 3d, at 1349–1350, and n. 7. The reliance is puzzling, for the circumstances in *Fromson* were crucially different from those presented here. The plaintiff in *Fromson* prevailed on an infringement claim and subsequently moved to hold the owners of the judgment-proof defendant corporation individually liable. To that extent only, *Fromson* resembles the instant case. Notably unlike Adams, however, the plaintiff in *Fromson* had moved *before trial* to add the individual owners as parties, because it suspected from the start that the defendant corporation might not be able to pay. The District Court denied that motion in reliance on the defendant corporation's false assurances that it was solvent. See 886 F. 2d, at 1301, 1304. Having been informed before trial that the plaintiffs sought to sue them in their individual capacities, and having acted deliberately to derail such a suit, the owners of the defendant corporation in *Fromson* could hardly assert that another's mistake or choice of whom to sue had compromised their ability to defend. Their problem, the Federal Circuit aptly observed in its *Fromson* opinion, was "a bed of their own making." *Id.*, at 1304. Here, in contrast, Adams never sought to sue Nelson individually until after judgment was entered against OCP. Nor is there any indication that Adams initially sought relief solely against OCP because of some false assurance regarding OCP's solvency.

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[1] Even when an amendment relates back to the original date of pleading under Rule 15(c), as Adams contends its amendment does, the relation back cannot, consistently with due process, deny a party all opportunity to be heard in response to the amendment. We also note in this regard that the instant case does not fall under Rule 15(c)(3), which deals with amendments that change the party or the name of the party against whom claims are asserted. That subsection applies only in cases involving "a mistake concerning the identity of the proper party." Fed. Rule Civ. Proc. 15(c)(3)(B). Respondent Adams made no such mistake. It knew of Nelson's role and existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against OCP.

To summarize, Nelson was never afforded a proper opportunity to respond to the claim against him. Instead, he was adjudged liable the very first moment his personal liability was legally at issue. Procedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process.[2]

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[2] A well-known work offers this example:

"'Herald, read the accusation!' said the King.

On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:

'*The Queen of Hearts, she made some tarts,*
    *All on a summer day:*
*The Knave of Hearts, he stole those tarts,*
    *And took them quite away!*'

'Consider your verdict,' the King said to the jury.

'Not yet, not yet!' the Rabbit interrupted. 'There's a great deal to come before that!'" L. Carroll, Alice in Wonderland and Through the Looking Glass 108 (Messner 1982) (emphasis in original).

## B

Adams strongly urges, however, that Nelson waived his objections to the swift process of the District Court. Adams first maintains that Nelson waived arguments based on personal jurisdiction and the absence of service of process by failing to raise them promptly after being added as a party. Brief for Respondents 32–41. Nelson's winning argument, however, is based neither on personal jurisdiction nor on service of process. It rests on his right to have time and opportunity to respond to the claim once Adams gained leave to sue Nelson in his individual capacity, and thereby to reach beyond OCP's corporate till into Nelson's personal pocket. Waiver of arguments based on personal jurisdiction and service of process is therefore beside the point.[3]

In a similar vein, and this time coming closer to the dispositive issue, Adams submits that the Federal Circuit "did not address the 'due process' issues now sought to be presented, . . . because these issues were never raised by Petitioner" before that court. *Id.*, at 47 (emphasis deleted). It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue. See, *e. g., Beech Aircraft Corp.* v. *Rainey*, 488 U. S. 153, 174–175 (1988). And the general rule does not prevent us from declaring what due process requires in this case, for that matter was fairly before the Court of Appeals.

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[3] We note that a waiver of service of process does not waive a party's right to time in which to respond to the substance of charges that, absent the waiver, would have been included in a served document. It would make little sense to penalize a party's waiver of process, which can help streamline litigation, by barring such a party from stating its side of the case. Indeed, such waiver can sometimes extend a party's time to respond. See Fed. Rule Civ. Proc. 12(a)(1)(B) (rather than having to respond within 20 days of service, a party waiving service may respond at any time within 60 days of the request for waiver).

In response to questioning from the appellate bench, Nelson's counsel explained that the core of his client's argument was the fundamental unfairness of imposing judgment without going through the process of litigation our rules of civil procedure prescribe.[4] Both the majority and the dissent in the Federal Circuit understood that an issue before them concerned the process due after Adams' postjudgment motion. See 175 F. 3d, at 1349, n. 5 (majority opinion); *id.*, at 1352 (Newman, J., dissenting). Our resolution of the case as a matter of due process therefore rests on a ground considered and passed upon by the court below.

Beneath Adams' technical and ultimately unavailing arguments about waiver, its essential position in the litigation is reflected in the Federal Circuit's decision: There was sufficient identity between Nelson and OCP to bind Nelson, without further ado, to a judgment already entered against OCP. Nelson was president and sole shareholder of OCP. See *id.*, at 1346. It was Nelson who withheld prior art from the Patent Office. See *id.*, at 1349. He had actual notice that Adams was seeking to collect a fee award from OCP, because he was the "effective controller" of the litigation for OCP and personally participated as a witness at the hearing on whether OCP had engaged in inequitable conduct. See *ibid.*

The Federal Circuit did not conclude that these factors would have justified imposing liability on Nelson by piercing

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[4] Nelson's counsel stated his position as follows: "[I]t's legally wrong to subject the individual, nonserved, nonsued, nonlitigated-against person to liability for that judgment. Because there are rules. The rules say if you want a judgment against somebody, you sue them, you litigate against them, you get a judgment against them." Tape of Oral Arg. in No. 98–1448 (CA Fed. Feb. 3, 1999).

OCP's corporate veil, see *id.*, at 1349, n. 6, and Adams, for its part, has disavowed reliance on a veil-piercing theory, see Record, Doc. No. 129, at 3 (stating, before the District Court, that "Adams does not request that the Court 'disregard the corporate form' "); Tape of Oral Arg. in No. 98–1448 (CA Fed. Feb. 3, 1999) (expressly stating that this case does not concern piercing the corporate veil). One-person corporations are authorized by law and should not lightly be labeled sham. See, *e. g., Gregory* v. *Helvering,* 293 U. S. 465, 469 (1935) (finding corporation a sham not because it was owned entirely by one person, but because it had "no business or corporate purpose"); *Kirno Hill Corp.* v. *Holt,* 618 F. 2d 982, 985 (CA2 1980) (a corporation's veil may not be pierced merely because it has only one owner). Indeed, where patents are concerned, the one-person corporation may be an altogether appropriate means to permit innovation without exposing inventors to possibly ruinous consequences. The legitimacy of OCP as a corporation, in short, is not at issue in this case.

Instead, the Federal Circuit reasoned that nothing much turned on whether the party opposing Adams' claim for costs and fees was OCP or Nelson. "[N]o basis has been advanced," the panel majority concluded, "to believe anything different or additional would have been done to defend against the allegation of inequitable conduct had Nelson individually already been added as a party or had he been a party from the outset." 175 F. 3d, at 1351. We neither dispute nor endorse the substance of this speculation. We say instead that judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated. As Judge Newman wrote in dissent: "The law, at its most fundamental, does not render judgment simply because a person might have been found liable had he been charged." *Id.*, at 1354.

Our decision surely does not insulate Nelson from liability. As counsel twice represented at oral argument, see Tr. of Oral Arg. 9, 19–20, Nelson seeks only the right to contest on the merits his personal liability for fees originally sought and awarded solely against OCP. That right, we hold, is just what due process affords him.[5]

* * *

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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[5] Once the amended pleading is served and Nelson's response is submitted, it will be open to Adams to urge, as Adams prematurely does here, Brief for Respondents 22–28, that issue preclusion (collateral estoppel) bars Nelson from contesting findings made during the litigation between OCP and Adams. See Restatement (Second) of Judgments § 39 (1980). We venture no opinion here about the possible success of such an argument, made at the proper time.

# SLACK *v.* McDANIEL, WARDEN, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–6322. Argued October 4, 1999—Reargued March 29, 2000—
Decided April 26, 2000

After petitioner Slack was convicted of second-degree murder in Nevada and his direct appeal was unsuccessful, he filed, in 1991, a federal habeas corpus petition under 28 U. S. C. § 2254. Because he wished to litigate claims he had not yet presented to the Nevada courts, but could not do so under the rule requiring complete exhaustion of state remedies, see *Rose* v. *Lundy,* 455 U. S. 509, Slack filed a motion to hold his federal petition in abeyance while he returned to state court. The Federal District Court ordered the habeas petition dismissed without prejudice, granting Slack leave to file an application to renew upon exhausting state remedies. After unsuccessful state postconviction proceedings, Slack filed anew in the federal court in 1995, presenting 14 claims for relief. The State moved to dismiss, arguing that (1) Slack's was a mixed petition raising some claims which had been presented to the state courts and some which had not, and (2) under the established Ninth Circuit rule, claims not raised in Slack's 1991 federal petition had to be dismissed as an abuse of the writ. The District Court granted the State's motion, holding, first, that Slack's 1995 petition was "[a] second or successive petition," even though his 1991 petition had been dismissed without prejudice for a failure to exhaust state remedies. The court then invoked the abuse of the writ doctrine to dismiss with prejudice the claims Slack had not raised in the 1991 petition. The dismissal order was filed in 1998, after which Slack filed in the District Court a pleading captioned "Notice of Appeal." Consistent with Circuit practice, the court treated the notice as an application for a certificate of probable cause (CPC) under the version of § 2253 that existed before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). It denied a CPC, concluding the appeal would raise no substantial issue. The Ninth Circuit likewise denied a CPC, so that Slack was not permitted to appeal the order dismissing his petition.

*Held:*

1. Where a habeas petitioner seeks to initiate an appeal of the dismissal of his petition after April 24, 1996 (AEDPA's effective date), the right to appeal is governed by the requirements now found at § 2253(c)—which provides, *inter alia,* that such an appeal may not be taken unless

a circuit Justice or judge issues a certificate of appealability (COA), § 2253(c)(1), and that the COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right, § 2253(c)(2)—even though the habeas petition was filed in the district court before AEDPA's effective date. Slack argues incorrectly that the pre-AEDPA version of the statute, not § 2253(c), controls his case because, in *Lindh* v. *Murphy*, 521 U. S. 320, 327, this Court held that AEDPA's § 2254 amendments governing entitlement to district court habeas relief applied to cases filed after AEDPA's effective date. In implementing *Lindh*, it must be recognized that § 2254 is directed to district court proceedings while § 2253 is directed to appellate proceedings. Just as § 2254 applies to cases filed in the trial court post-AEDPA, § 2253 applies to appellate proceedings initiated post-AEDPA. Although *Lindh* requires a court of appeals to apply pre-AEDPA law in reviewing the trial court's ruling in cases commenced there pre-AEDPA, post-AEDPA law governs the right to appeal in cases such as the present. While an appeal is a continuation of the litigation started in the trial court, it is a distinct step. *E. g., Hohn* v. *United States*, 524 U. S. 236, 241. Under AEDPA, an appellate case is commenced when the application for a COA is filed. *Ibid.* When Congress instructs that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court. Because Slack sought appellate review of the dismissal of his habeas petition two years after AEDPA's effective date, § 2253(c) governs here, and Slack must apply for a COA. The Ninth Circuit should have treated his notice of appeal as such an application. Pp. 480–482.

2. When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Pp. 483–485.

(a) The Court rejects the State's contentions that, because § 2253(c) provides that a COA may issue upon the "substantial showing of the denial of a constitutional right," only constitutional rulings may be appealed, and no appeal can be taken if the district court relies on procedural grounds to dismiss the petition. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal. This conclusion follows from

AEDPA's present provisions, which incorporate earlier habeas corpus principles. Except for substituting the word "constitutional" for the word "federal," the present § 2253 is a codification of the CPC standard announced in *Barefoot* v. *Estelle*, 463 U. S. 880, 894. See *Williams* v. *Taylor*, *ante*, at 434. Under *Barefoot*, a substantial showing of the denial of a right includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" 463 U. S., at 893, and n. 4. Pp. 483–484.

(b) Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments. Resolution of procedural issues first is allowed and encouraged by the rule that this Court will not pass upon a constitutional question if there is also present some other ground upon which the case may be disposed of. *Ashwander* v. *TVA*, 297 U. S. 288, 347. Here, Slack did not attempt to make a substantial showing of the denial of a constitutional right, instead arguing only that the District Court's procedural rulings were wrong. This Court does not attempt to determine whether Slack could make the required showing of constitutional error, for the issue was neither briefed nor presented below because of the view that the CPC, rather than COA, standards applied. It will be necessary to consider the matter upon any remand for further proceedings. The Court does, however, address the second component of the § 2253(c) inquiry, whether jurists of reason could conclude that the District Court's dismissal on procedural grounds was debatable or incorrect. Pp. 484–485.

3. A habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a "second or successive" petition as that term is understood in the habeas corpus context. Pp. 485–490.

(a) The District Court erred in concluding to the contrary. Because the question whether Slack's pre-AEDPA, 1995 petition was second or successive implicates his right to relief in the trial court, pre-AEDPA law governs. See *Lindh* v. *Murphy*, *supra*. Whether the dismissal was appropriate is controlled by Rule 9(b) of the Rules Governing § 2254, which incorporates the Court's prior decisions on the subject, *McCleskey* v. *Zant*, 499 U. S. 467, 487, and states: "A second or successive petition [alleging new and different grounds] may be dismissed if . . . the judge finds that the failure . . . to assert those grounds in a prior petition constituted an abuse of the writ." The "second or successive petition" phrase is a term of art given substance in, *e. g.*, *Rose* v. *Lundy*, 455 U. S., at 510, which held that a district court must dismiss habeas petitions containing both exhausted and unexhausted claims, but contemplated that the prisoner could return to federal court after the requisite exhaustion, *id.*, at 520–521. Thus, a petition filed after a mixed petition has been dismissed under *Rose* v. *Lundy* before the district court adjudicated any claims is to be treated as any other first petition and is not a second or successive petition. Neither *Rose* v. *Lundy* nor *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), supports the State's contention that the prisoner, upon his return to federal court, should be restricted to the claims made in his initial petition. It is instead more appropriate to treat the initial mixed petition as though it had not been filed, subject to whatever conditions the court attaches to the dismissal. Accordingly, Slack's 1995 petition should not have been dismissed on the grounds that it was second or successive. To the extent that the Court's ruling might allow prisoners repeatedly to return to state court and thereby inject undue delay into the collateral review process, the problem can be countered under the States' power to impose proper procedural bars and the federal courts' broad powers to prevent duplicative or unnecessary litigation. Pp. 485–489.

(b) Thus, Slack has demonstrated that reasonable jurists could conclude that the District Court's abuse of the writ holding was wrong. Whether Slack is otherwise entitled to the issuance of a COA is a question to be resolved first upon remand. Pp. 489–490.

Reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, Part I of which was unanimous, Part II of which was joined by REHNQUIST, C. J., and O'CONNOR, SCALIA, THOMAS, and GINSBURG, JJ., and Parts III and IV of which were joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER and BREYER, JJ., joined, *post*, p. 490. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 490.

*Michael Pescetta*, by appointment of the Court, 526 U. S. 1049, argued and reargued the cause for petitioner. With him on the briefs was *Timothy P. O'Toole*.

*Matthew D. Roberts* argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Waxman, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben,* and *Vicki S. Marani.*

*David F. Sarnowski,* Chief Deputy Attorney General of Nevada, argued and reargued the cause for respondents. With him on the briefs were *Frankie Sue Del Papa,* Attorney General, and *Julie A. Slabaugh,* Deputy Attorney General. With him on the brief on the original argument was Ms. Del Papa.*

JUSTICE KENNEDY delivered the opinion of the Court.

We are called upon to resolve a series of issues regarding the law of habeas corpus, including questions of the proper application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). We hold as follows:

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers et al. by *Edward M. Chikofsky, Barbara E. Bergman,* and *David M. Porter;* and for the Rutherford Institute by *John W. Whitehead.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *David P. Druliner,* Chief Assistant Attorney General, *Carol Wendelin Pollack,* Senior Assistant Attorney General, and *Donald E. De Nicola* and *A. Scott Hayward,* Deputy Attorneys General, joined by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thomas J. Miller* of Iowa, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Patricia A. Madrid* of New Mexico, *Michael F. Easley* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Earley* of Virginia, and *Christine O. Gregoire* of Washington; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

First, when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition after April 24, 1996 (the effective date of AEDPA), the right to appeal is governed by the certificate of appealability (COA) requirements now found at 28 U. S. C. § 2253(c) (1994 ed., Supp. III). This is true whether the habeas corpus petition was filed in the district court before or after AEDPA's effective date.

Second, when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Third, a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a "second or successive" petition as that term is understood in the habeas corpus context. Federal courts do, however, retain broad powers to prevent duplicative or unnecessary litigation.

## I

Petitioner Antonio Slack was convicted of second-degree murder in Nevada state court in 1990. His direct appeal was unsuccessful. On November 27, 1991, Slack filed a petition for writ of habeas corpus in federal court under 28 U. S. C. § 2254. Early in the federal proceeding, Slack decided to litigate claims he had not yet presented to the Nevada courts. He could not raise the claims in federal court because, under the exhaustion of remedies rule explained in *Rose* v. *Lundy*, 455 U. S. 509 (1982), a federal court was required to dismiss a petition presenting claims not yet litigated in state court. Accordingly, Slack filed a motion seeking to hold his federal petition in abeyance while he returned to state court to exhaust the new claims. Without objection by the State, the District Court ordered the habeas petition dismissed "without prejudice." The order, dated February 19, 1992, further stated, "Petitioner is granted leave to file an application to renew upon exhaustion of all State remedies." *Slack* v. *Director, Nev. Dept. of Prisons,* No. CV–N–91–561 (D. Nev.), App. 22.

After an unsuccessful round of state postconviction proceedings, Slack filed a new federal habeas petition on May 30, 1995. The District Court later appointed counsel, directing him to file an amended petition or a notice of intention to proceed with the current petition. On December 24, 1997, counsel filed an amended petition presenting 14 claims for relief. The State moved to dismiss the petition. As its first ground, the State argued that Slack's petition must be dismissed because it was a mixed petition, that is to say a petition raising some claims which had been presented to the state courts and some which had not. As its second ground, the State cited *Farmer* v. *McDaniel,* 98 F. 3d 1548 (CA9 1996), and contended that, under the established rule in the Ninth Circuit, claims Slack had not raised in his 1991 federal habeas petition must be dismissed as an abuse of the writ.

The District Court granted the State's motion. First, the court relied on *Farmer* to hold that Slack's 1995 petition was "[a] second or successive petition," even though his 1991 petition had been dismissed without prejudice for a failure to exhaust state remedies. The court then invoked the abuse of the writ doctrine to dismiss with prejudice the claims Slack had not raised in the 1991 petition. This left Slack with four claims, each having been raised in the 1991 petition; but one of these, the court concluded, had not yet been presented to the state courts. The court therefore dismissed Slack's remaining claims because they were in a mixed petition. Here, Slack seeks to challenge the dismissal of claims as abusive; he does not contend that all claims presented in the amended petition were exhausted.

The District Court's dismissal order was filed March 30, 1998. On April 29, 1998, Slack filed in the District Court a pleading captioned "Notice of Appeal." Consistent with Circuit practice, the court treated the notice as an application for a certificate of probable cause (CPC) under the pre-AEDPA version of 28 U. S. C. § 2253; and it denied a CPC, concluding the appeal would raise no substantial issue. The Court of Appeals likewise denied a CPC. No. CV–95–194 (CA9, July 7, 1998), App. 197. As a result, Slack was not permitted to take an appeal of the order dismissing his petition. We granted certiorari. 525 U. S. 1138 (1999). Slack contends that he is entitled to an appeal of the dismissal of his petition, arguing that the District Court was wrong to hold that his 1995 petition was "second or successive." We agree that Slack's 1995 petition was not second or successive, but first we must resolve two preliminary questions.

## II

Before AEDPA, appellate review of the dismissal of a habeas petition was governed by a version of 28 U. S. C. § 2253 enacted in 1948. Act of June 25, 1948, 62 Stat. 967. The statute provided no appeal could be taken from the final order in a habeas corpus proceeding "unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." *Ibid.* The statute did not explain the standards for the issuance of a CPC, but the Court established what a prisoner must show to obtain a CPC in *Barefoot* v. *Estelle*, 463 U. S. 880 (1983): "a substantial showing of the denial of a federal right." *Id.*, at 893 (citation and brackets omitted).

Effective April 24, 1996, AEDPA amended § 2253. As relevant here, AEDPA added subsection (c), which provides:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> "(B) the final order in a proceeding under section 2255.
>
> "(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> "(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." 28 U. S. C. § 2253(c) (1994 ed., Supp. III).

The issue we consider at the outset is whether the pre- or post-AEDPA version of § 2253 controls Slack's right to appeal. In *Lindh* v. *Murphy*, 521 U. S. 320 (1997), the Court held that AEDPA's amendments to 28 U. S. C. § 2254, the statute governing entitlement to habeas relief in the district court, applied to cases filed after AEDPA's effective date. 521 U. S., at 327. Slack contends that *Lindh* means § 2253(c) does not apply to him because his case was commenced in the District Court pre-AEDPA. That position is incorrect. For purposes of implementing the holding in *Lindh*, it must be recognized that § 2254 is directed to proceedings in the district courts while § 2253 is directed to proceedings in the appellate courts. Just as § 2254 applies to cases filed in the trial court post-AEDPA, § 2253 applies to appellate proceedings initiated post-AEDPA. True, *Lindh* requires a court of appeals to apply pre-AEDPA law in reviewing the trial court's ruling, for cases commenced there pre-AEDPA; but post-AEDPA law governs the right to appeal in cases such as the one now before us.

While an appeal is a continuation of the litigation started in the trial court, it is a distinct step. *Hohn* v. *United*

*States,* 524 U. S. 236, 241 (1998); *Mackenzie* v. *A. Engelhard & Sons Co.,* 266 U. S. 131 (1924). We have described proceedings in the courts of appeals as "appellate cases." *E. g.,* Order of Apr. 30, 1991, 500 U. S. 1009 (amendments to Federal Rules of Appellate Procedure "shall govern all proceedings in appellate cases thereafter commenced"). Under AEDPA, an appellate case is commenced when the application for a COA is filed. *Hohn, supra,* at 241. When Congress instructs us (as *Lindh* says it has) that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court. Thus, § 2253(c) governs appellate court proceedings filed after AEDPA's effective date. We see no indication that Congress intended to tie application of the provisions to the date a petition was filed in the district court. The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal. *Hohn, supra,* at 248; cf. *Lindh, supra,* at 327. Because Slack sought appellate review two years after AEDPA's effective date, § 2253(c) governs his right to appeal.

We further note that we applied § 2253 in our post-*Lindh* decision in *Hohn,* a case which arrived in the same posture as this case. Like Slack, Hohn argued § 2253(c) did not apply because his petition had been filed in the District Court before AEDPA's effective date. Brief for Petitioner in *Hohn* v. *United States,* O. T. 1997, No. 96–8986, pp. 40–44. Though our opinion did not discuss whether § 2253(c) applied to Hohn, we would have had no reason to reach the issue we did resolve, that we had statutory certiorari jurisdiction to review the denial of a COA, if AEDPA did not apply at all. Our disposition today is consistent with *Hohn.* AEDPA governs the conditions of Slack's appeal, and so he was required to seek a COA to obtain appellate review of the dismissal of his habeas petition.

## III

As AEDPA applied, the Court of Appeals should have treated the notice of appeal as an application for a COA. Fed. Rule App. Proc. 22(b); Fed. Rule Civ. Proc. 8(f); see also *Hohn*, *supra*, at 240. To evaluate whether the Court of Appeals should have granted a COA, we must determine what the habeas applicant must show to satisfy the requirements of § 2253(c).

Citing § 2253(c)'s requirement that a COA may issue only upon the "substantial showing of the denial of a constitutional right," the State contends that no appeal can be taken if the District Court relies on procedural grounds to dismiss the petition. According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural grounds would be denied relief. We reject this interpretation. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.

Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles. Under AEDPA, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U. S. C. § 2253(c) (1994 ed., Supp. III). Except for substituting the word "constitutional" for the word "federal," § 2253 is a codification of the CPC standard announced in *Barefoot* v. *Estelle*, 463 U. S., at 894. Congress had before it the meaning *Barefoot* had given to the words it selected; and we give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word "constitutional." See *Williams* v. *Taylor*, *ante*, at 434. To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot,* includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Barefoot, supra,* at 893, and n. 4 ("sum[ming] up" the "'substantial showing'" standard).

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard provided in *Barefoot, supra,* at 893, and n. 4, and adopted by Congress in AEDPA. Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments. The recognition that the "Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring), allows and encourages the court to first resolve procedural issues. The *Ashwander* rule should inform the court's discretion in this regard.

In this case, Slack did not attempt to make a substantial showing of the denial of a constitutional right, instead arguing only that the District Court's procedural rulings were wrong. We will not attempt to determine whether Slack could make the required showing of constitutional error, for the issue was neither briefed nor presented below because of the view that the CPC, rather than COA, standards applied. It will be necessary to consider the matter upon any remand for further proceedings. We will, however, address the second component of the § 2253(c) inquiry, whether jurists of reason could conclude that the District Court's dismissal on procedural grounds was debatable or incorrect. The issue has been discussed in the briefs presented to us; it is the question upon which we granted certiorari; and its resolution would end the case, were we to decide the matter in the State's favor.

The District Court dismissed claims Slack failed to raise in his 1991 petition based on its conclusion that Slack's 1995 petition was a second or successive habeas petition. This conclusion was wrong. A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition.

Slack commenced this habeas proceeding in the District Court in 1995, before AEDPA's effective date. Because the question whether Slack's petition was second or successive implicates his right to relief in the trial court, pre-AEDPA law governs, see *Lindh* v. *Murphy,* 521 U. S. 320 (1997), though we do not suggest the definition of second or successive would be different under AEDPA. See *Stewart* v. *Martinez-Villareal,* 523 U. S. 637 (1998) (using pre-AEDPA law to interpret AEDPA's provision governing "second or successive habeas applications"). The parties point us to Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts as controlling the issue. The Rule incorporates our prior decisions regarding successive petitions and abuse of the writ, *McCleskey* v. *Zant,* 499 U. S. 467, 487 (1991), and states: "A second or successive petition [alleging new and different grounds] may be dismissed if . . . the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." As the text demonstrates, Rule 9(b) applies only to "a second or successive petition."

The phrase "second or successive petition" is a term of art given substance in our prior habeas corpus cases. The Court's decision in *Rose* v. *Lundy,* 455 U. S., at 510, instructs us in reaching our understanding of the term. *Rose* v. *Lundy* held that a federal district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims. The opinion, however, contemplated that the prisoner could return to federal court after the requisite exhaustion. *Id.,* at 520 ("Those prisoners who . . . submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their claims"). It was only if a prisoner declined to return to state court and decided to proceed with his exhausted claims in federal court that the possibility arose that a subsequent petition would be considered second or successive and subject to dismissal as an abuse of the writ. *Id.,* at 520–521 (plurality opinion) ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions").

This understanding of the second or successive rule was confirmed two Terms ago when we wrote as follows: "[N]one of our cases . . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition." *Stewart* v. *Martinez-Villareal, supra,* at 644. We adhere to this analysis. A petition filed after a mixed petition has been dismissed under *Rose* v. *Lundy* before the district court adjudicated any claims is to be treated as "any other first petition" and is not a second or successive petition.

The State contends that the prisoner, upon his return to federal court, should be restricted to the claims made in his initial petition. Neither *Rose* v. *Lundy* nor *Martinez-Villareal* requires this result, which would limit a prisoner to claims made in a pleading that is often uncounseled, handwritten, and pending in federal court only until the State identifies one unexhausted claim. The proposed rule would bar the prisoner from raising nonfrivolous claims developed in the subsequent state exhaustion proceedings contemplated by the *Rose* dismissal, even though a federal court had yet to review a single constitutional claim. This result would be contrary to our admonition that the complete exhaustion rule is not to "trap the unwary *pro se* prisoner." *Rose supra,* at 520 (internal quotation marks omitted). It is instead more appropriate to treat the initial mixed petition as though it had not been filed, subject to whatever conditions the court attaches to the dismissal. *Rose* v. *Lundy* dictated that, whatever particular claims the petition contained, none could be considered by the federal court.

Slack's 1991 petition was dismissed under the procedure established in *Rose* v. *Lundy.* No claim made in Slack's 1991 petition was adjudicated during the three months it was pending in federal court. As such, the 1995 petition should not have been dismissed on the grounds that it was second or successive. Reasoning to the contrary found in the Court of Appeals' *Farmer* decision, rendered before *Martinez-Villareal,* is incorrect. See also *In re Turner,* 101 F. 3d 1323 (CA9 1997) (refusing to apply rules governing second or successive petitions to a petitioner whose prior habeas petition had been dismissed for failure to exhaust). Our view that established practice demonstrates that Slack's 1995 petition is not second or successive is confirmed as well by opinions of the Courts of Appeals which have addressed the point under similar circumstances. *E. g., Carlson* v. *Pitcher,* 137 F. 3d 416, 420 (CA6 1998) ("We join with every other court to consider the question, and hold that a *habeas* petition filed after a previous petition has been dismissed on exhaustion grounds is not a 'second or successive' petition"); *Turner, supra; Christy* v. *Horn,* 115 F. 3d 201, 208 (CA3 1997); *Dickinson* v. *Maine,* 101 F. 3d 791 (CA1 1996); *Camarano* v. *Irvin,* 98 F. 3d 44, 45–46 (CA2 1996).

The State complains that this rule is unfair. The filing of a mixed petition in federal court requires it to appear and to plead failure to exhaust. The petition is then dismissed without prejudice, allowing the prisoner to make a return trip through the state courts to exhaust new claims. The State expresses concern that, upon exhaustion, the prisoner would return to federal court but again file a mixed petition, causing the process to repeat itself. In this manner, the State contends, a vexatious litigant could inject undue delay into the collateral review process. To the extent the tactic would become a problem, however, it can be countered without upsetting the established meaning of a second or successive petition.

First, the State remains free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings. Second, provisions of AEDPA may bear upon the question in cases to which the Act applies. AEDPA itself demonstrates that Congress may address matters relating to exhaustion and mixed petitions through means other than rules governing "second or successive" petitions. *E. g.,* 28 U. S. C. § 2254(b)(2) (1994 ed., Supp. III). Third, the Federal Rules of Civil Procedure, applicable as a general matter to habeas cases, vest the federal courts with due flexibility to prevent vexatious litigation. As Slack concedes, in the habeas corpus context it would be appropriate for an order dismissing a mixed petition to instruct an applicant that upon his return to federal court he is to bring only exhausted claims. See Fed. Rules Civ. Proc. 41(a) and (b). Once the petitioner is made aware of the exhaustion requirement, no reason exists for him not to exhaust all potential claims before returning to federal court. The failure to comply with an order of the court is grounds for dismissal with prejudice. Fed. Rule Civ. Proc. 41(b). In this case, however, the initial petition was dismissed without condition and without prejudice. We reject the State's argument that refusing to give a new meaning to the established term "second or successive" opens the door to the abuses described.

## IV

Slack has demonstrated that reasonable jurists could conclude that the District Court's abuse of the writ holding was wrong, for we have determined that a habeas petition filed after an initial petition was dismissed under *Rose* v. *Lundy* without an adjudication on the merits is not a "second or successive" petition. Whether Slack is otherwise entitled to the issuance of a COA is a question to be resolved first upon remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring in part and concurring in the judgment.

With respect to the issue resolved in Part II of the Court's opinion, I agree with the Courts of Appeals that have held that the pre-AEDPA version of 28 U. S. C. § 2253 governs the right to appeal with respect to an appeal noticed after the effective date of AEDPA in a habeas corpus proceeding commenced prior to that date. See *Fuller* v. *Roe*, 182 F. 3d 699, 702 (CA9 1999) *(per curiam)*; *Crowell* v. *Walsh*, 151 F. 3d 1050, 1051–1052 (CADC 1998); *Tejeda* v. *Dubois*, 142 F. 3d 18, 22, n. 4 (CA1 1998); *Berrios* v. *United States*, 126 F. 3d 430, 431, n. 2 (CA2 1997); *United States* v. *Kunzman*, 125 F. 3d 1363, 1364, n. 2 (CA10 1997); *United States* v. *Skandier*, 125 F. 3d 178, 179–182 (CA3 1997); *Hardwick* v. *Singletary*, 122 F. 3d 935, 936 *(per curiam)*, vacated in part on other grounds, 126 F. 3d 1312 (CA11 1997) *(per curiam)*; *Arredondo* v. *United States*, 120 F. 3d 639, 640 (CA6 1997); *United States* v. *Carter*, 117 F. 3d 262, 264 (CA5 1997) *(per curiam)*; but see *Tiedeman* v. *Benson*, 122 F. 3d 518, 520–521 (CA8 1997).

I do, however, join the balance of the Court's opinion and its judgment.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

I join the opinion of the Court, except for its discussion in Parts III and IV of whether Slack's postexhaustion petition was second or successive. I believe that the Court produces here, as it produced in a different respect in *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998), see *id.*, at 646

(SCALIA, J., dissenting), a distortion of the natural meaning of the term "second or successive."

The opinion relies on *Martinez-Villareal*, together with *Rose* v. *Lundy*, 455 U. S. 509 (1982), to conclude that a prisoner whose federal petition is dismissed to allow exhaustion may return to federal court without having his later petition treated as second or successive, regardless of what claims it contains. Neither the holdings nor even the language of those opinions suggest that proposition. As for holdings: *Martinez-Villareal* did not even involve the issue of exhaustion, and so has no bearing upon the present case. The narrow holding of *Rose* v. *Lundy* was that a habeas petition containing both exhausted and unexhausted claims must be dismissed, but it can be fairly said to have embraced the proposition that the petitioner could return with the same claims after they all had been exhausted. This latter proposition could be thought to rest upon the theory that a petition dismissed for lack of exhaustion is a petition that never existed, so that *any other later petition* would not be second or successive. Or it could be thought to rest upon the theory that the later refiling of the original claims, all of them now exhausted, is just a renewal of the first petition, implicitly authorized by the dismissal to permit exhaustion. The former theory is counterfactual; the latter is quite plausible.

The language the Court quotes from *Rose* and *Martinez-Villareal* also does not justify the Court's mixed-petitions-don't-count theory. The quotation from *Rose* says only that "'prisoners who . . . submit mixed petitions . . . are entitled to . . . exhaust the *remainder of their claims.*'" *Ante*, at 486 (quoting *Rose*, *supra*, at 520 (emphasis added)). This does not suggest that they are entitled to add new claims, or to return, once again, without accomplishing the exhaustion that the court dismissed the petition to allow. And the quotation from *Martinez-Villareal* indicates only that when a prisoner whose habeas petition was dismissed for failure to exhaust state remedies "'then did exhaust those remedies'" and refile in federal court, the court "'could adjudicate *these claims* under the same standard as would govern those made in any other first petition.'" *Ante,* at 487 (quoting *Martinez-Villareal,* 523 U. S., at 644 (emphasis added)). This does not require treating the later filed petition as a "first" petition regardless of whether it bears any resemblance to the petition initially filed. In fact, *Martinez-Villareal* clearly recognized the potential significance of raising a new claim rather than merely renewing an old one: It held that a petition raising a claim of incompetence to be executed previously dismissed as premature was not second or successive, but expressly distinguished, and left open, the situation where the claim had not been raised in the earlier petition. See *id.,* at 645, n.

The State understandably fears the consequences of the Court's approach, which would allow federal petitions to be repeatedly filed and dismissed for lack of exhaustion, requiring the State repeatedly to appear and expend its resources, with no help in sight from supposed limitations on "second or successive" petitions. The Court reassuringly observes that this problem can be countered in other ways, without "upsetting the established meaning of a second or successive petition." *Ante,* at 489. But as discussed above, it is not "established" that a first petition ceases to be a first petition when it is dismissed to permit exhaustion. And though the problem of repetitive filings after dismissals for lack of exhaustion can of course be countered in other ways, so can the problem of repetitive filings for all other reasons. It happens to be the whole *purpose* of the "second or successive" provision to solve *precisely that problem*—directly checking the "vexatious litigant," *ante,* at 488, rather than hoping that the courts will use a patchwork of other provisions to achieve the same end. I do not disagree with the Court that district courts may be able to limit repeated filings through appropriate orders pursuant to Federal Rules of Civil Procedure 41(a) and (b). This burden on district courts would not be necessary, however—and the States would not be remanded to reliance upon the discretion of district judges—if the limitation on "second or successive" petitions were given its natural meaning.

Because I believe petitioner's inclusion of new and unexhausted claims in his postexhaustion petition rendered it second or successive, he is not entitled to a certificate of appealability, and I would affirm the decision of the Court of Appeals.

# BECK *v.* PRUPIS ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98–1480. Argued November 3, 1999—Decided April 26, 2000

The Racketeer Influenced and Corrupt Organizations Act (RICO) creates a civil cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U. S. C. § 1964(c). Subsection (d) of § 1962 forbids "any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [§ 1962]." Petitioner is a former president, CEO, director, and shareholder of Southeastern Insurance Group (SIG). Respondents are former senior officers and directors of SIG who allegedly conspired to, and did, engage in acts of racketeering. Petitioner alleged that after he discovered respondents' unlawful conduct and contacted regulators, respondents orchestrated a scheme to remove him from the company. Petitioner sued respondents, asserting, among other things, a § 1964(c) cause of action for respondents' alleged conspiracy to violate §§ 1962(a), (b), and (c). Petitioner alleged that his injury was proximately caused by an overt act—namely, the termination of his employment—done in furtherance of respondents' conspiracy, and that § 1964(c) therefore provided a cause of action. The District Court dismissed his RICO conspiracy claim, agreeing with respondents that employees who are terminated for refusing to participate in RICO activities, or who threaten to report RICO activities, do not have standing to sue under RICO for damages from their loss of employment. In affirming, the Eleventh Circuit held that, because the overt act causing petitioner's injury was not an act of racketeering, it could not support a § 1964(c) cause of action.

*Held:* Injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO does not give rise to a cause of action under § 1964(c) for a violation of § 1962(d). To determine what it means to be "injured . . . by reason of" a "conspir[acy]," this Court must look to the common law of civil conspiracy. At common law, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious. When Congress adopted RICO, it incorporated this principle. As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by *any* act in furtherance of a conspiracy that might have caused the plaintiff injury. Rather, such plaintiff must allege injury from an act that is analogous to an "ac[t] of a tortious character," see 4 Restatement (Second) of Torts, §876, Comment *b*, meaning an act that is independently wrongful under RICO. The specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive violation the defendant is alleged to have committed. Because respondents' alleged overt act in furtherance of their conspiracy was not an act of racketeering and is not independently wrongful under any substantive provision of the statute, petitioner does not have a cause of action under §1964(c). Pp. 500–507.

162 F. 3d 1090, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 507.

*Jay Starkman* argued the cause for petitioner. With him on the briefs were *Jane W. Moscowitz* and *Joel S. Magolnick*.

*Michael M. Rosenbaum* argued the cause for respondents. With him on the brief for respondents Bellezza et al. were *Donald P. Jacobs* and *Richard M. DeAgazio*. *Frederick Mezey*, *pro se*, filed a brief as respondent.*

JUSTICE THOMAS delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§1961–1968 (1994 ed. and Supp. IV), creates a civil cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U. S. C. §1964(c) (1994 ed., Supp. IV). Subsection (d) of §1962 in turn provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [§1962]." The question before us is whether a person injured by an overt act done in furtherance of a RICO conspiracy has a cause of action under § 1964(c), even if the overt act is not an act of racketeering. We conclude that such a person does not have a cause of action under § 1964(c).

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*Stephen M. Kohn, Michael D. Kohn,* and *David K. Colapinto* filed a brief for the National Whistleblower Center as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Tort Reform Association et al. by *Victor E. Schwartz, Mark A. Behrens,* and *Jeffrey L. Gabardi;* and for the Washington Legal Foundation et al. by *F. Joseph Warin, Daniel J. Popeo,* and *Paul D. Kamenar.*

## I

### A

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922, for the purpose of "seek[ing] the eradication of organized crime in the United States," *id.*, at 923. Congress found that "organized crime in the United States [had become] a highly sophisticated, diversified, and widespread activity that annually drain[ed] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." *Id.*, at 922. The result was to "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *Id.*, at 923. Finding the existing "sanctions and remedies available to the Government [to be] unnecessarily limited in scope and impact," Congress resolved to address the problem of organized crime "by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Ibid.*

RICO attempts to accomplish these goals by providing severe criminal penalties for violations of § 1962, see § 1963, and also by means of a civil cause of action for any person "injured in his business or property by reason of a violation of section 1962," 18 U. S. C. § 1964(c) (1994 ed., Supp. IV).[1]

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[1] RICO also authorizes the Government to bring civil actions to "prevent and restrain" violations of § 1962. 18 U. S. C. §§ 1964(a) and (b).

Section 1962, in turn, consists of four subsections: Subsection (a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce";[2] subsection (b) makes it "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce"; subsection (c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt"; and, finally, subsection (d) makes it unlawful "for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

## B

Petitioner, Robert A. Beck II, is a former president, CEO, director, and shareholder of Southeastern Insurance Group (SIG).[3] Respondents, Ronald M. Prupis, Leonard Bellezza,

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[2] Section 1961(1) contains an exhaustive list of acts of "racketeering," commonly referred to as "predicate acts." This list includes extortion, mail fraud, and wire fraud, which were among the 50 separate acts of racketeering alleged by petitioner. Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

[3] On review of the Court of Appeals' affirmance of summary judgment for respondents, we accept as true the evidence presented by petitioner. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986).

William Paulus, Jr., Ernest S. Sabato, Harry Olstein, Frederick C. Mezey, and Joseph S. Littenberg, are former senior officers and directors of SIG. Until 1990, when it declared bankruptcy, SIG was a Florida insurance holding company with three operating subsidiaries, each of which was engaged in the business of writing surety bonds for construction contractors.

Beginning in or around 1987, certain directors and officers of SIG, including respondents, began engaging in acts of racketeering. They created an entity called Construction Performance Corporation, which demanded fees from contractors in exchange for qualifying them for SIG surety bonds. Respondents also diverted corporate funds to personal uses and submitted false financial statements to regulators, shareholders, and creditors. During most of the time he was employed at SIG, petitioner was unaware of these activities. In early 1988, however, petitioner discovered respondents' unlawful conduct and contacted regulators concerning the financial statements. Respondents then orchestrated a scheme to remove petitioner from the company. They hired an insurance consultant to write a false report suggesting that petitioner had failed to perform his material duties. The day after this report was presented to the SIG board of directors, the board fired petitioner, relying on a clause in his contract providing for termination in the event of an "inability or substantial failure to perform [his] material duties." App. 104. Petitioner sued respondents, asserting, among other things, a civil cause of action under § 1964(c).[4] In particular, petitioner claimed that respondents used or invested income derived from a pattern of racketeering activity to establish and operate an enterprise, in violation of § 1962(a); acquired and maintained an interest in and control of their enterprise through a pattern of racketeering activity, in violation of § 1962(b); engaged in the conduct of the enterprise's affairs through a pattern of racketeering activity, in violation of § 1962(c); and, most importantly for present purposes, conspired to commit the aforementioned acts, in violation of § 1962(d). With respect to this last claim, petitioner's theory was that his injury was proximately caused by an overt act—namely, the termination of his employment—done in furtherance of respondents' conspiracy, and that § 1964(c) therefore provided a cause of action. Respondents filed a motion for summary judgment, arguing that employees who are terminated for refusing to participate in RICO activities, or who threaten to report RICO activities, do not have standing to sue under RICO for damages from their loss of employment. The District Court agreed and dismissed petitioner's RICO conspiracy claim. The Court of Appeals affirmed, holding that a cause of action under § 1964(c) for a violation of § 1962(d) is not available to a person injured by an overt act in furtherance of a RICO conspiracy unless the overt act is an act of racketeering. 162 F. 3d 1090, 1098 (CA11 1998). Since the overt act that allegedly caused petitioner's injury was not an act of racketeering, see § 1961(1), it could not support a civil cause of action. The court held, "RICO was enacted with an express target—racketeering activity—and only those injuries that are proximately caused by racketeering activity should be actionable under the statute." *Ibid.*[5]

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[4] Petitioner's lawsuit was originally brought as a cross-claim in a shareholders' derivative suit filed against SIG officers and directors, including petitioner, in the United States District Court for the District of New Jersey. The New Jersey District Court severed petitioner's claims and transferred them to the Southern District of Florida.

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[5] Although petitioner alleged violations of §§ 1962(a), (b), and (c), the Court of Appeals concluded that he had presented no evidence of violations of subsections (a) and (b). It therefore treated each of petitioner's substantive RICO claims as alleging a violation of § 1962(c). 162 F. 3d, at 1095, n. 8. The court held that petitioner did not present evidence regarding elements of his § 1962(c) claims and therefore affirmed the District Court's order granting summary judgment for respondents with respect to those claims. *Id.*, at 1095–1098. Petitioner does not challenge the Court of Appeals' conclusion with respect to his claims under §§ 1962(a)–(c).

We granted certiorari, 526 U. S. 1158 (1999), to resolve a conflict among the Courts of Appeals on the question whether a person injured by an overt act in furtherance of a conspiracy may assert a civil RICO conspiracy claim under § 1964(c) for a violation of § 1962(d) even if the overt act does not constitute "racketeering activity." The majority of the Circuits to consider this question have answered it in the negative. See, *e. g., Bowman* v. *Western Auto Supply Co.*, 985 F. 2d 383, 388 (CA8), cert. denied, 508 U. S. 957 (1993); *Miranda* v. *Ponce Fed. Bank*, 948 F. 2d 41, 48 (CA1 1991); *Reddy* v. *Litton Indus., Inc.*, 912 F. 2d 291, 294–295 (CA9 1990), cert. denied, 502 U. S. 921 (1991); *Hecht* v. *Commerce Clearing House, Inc.*, 897 F. 2d 21, 25 (CA2 1990). Other Circuits have allowed RICO conspiracy claims where the overt act was, as in the instant case, merely the termination of employment, and was not, therefore, racketeering activity. See, *e. g., Khurana* v. *Innovative Health Care Systems, Inc.*, 130 F. 3d 143, 153–154 (CA5 1997), vacated *sub nom. Teel* v. *Khurana*, 525 U. S. 979 (1998); *Schiffels* v. *Kemper Financial Services, Inc.*, 978 F. 2d 344, 348–349 (CA7 1992); *Shearin* v. *E. F. Hutton Group, Inc.*, 885 F. 2d 1162, 1168–1169 (CA3 1989).

## II

This case turns on the combined effect of two provisions of RICO that, read in conjunction, provide a civil cause of action for conspiracy. Section 1964(c) states that a cause of action is available to anyone "injured . . . by reason of a violation of section 1962." Section 1962(d) makes it unlawful for a person "to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." To determine what it means to be "injured . . . by reason of" a "conspir[acy]," we turn to the well-established common law of civil conspiracy. As we have said, when Congress uses language with a settled meaning at common law, Congress

> "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

See *Molzof* v. *United States*, 502 U. S. 301, 307 (1992) (quoting *Morissette, supra*, at 263); *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329 (1981).[6]

By the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious. See, *e. g.*, 4 Restatement (Second) of Torts § 876, Comment *b* (1977) ("The mere common plan, design or even express agreement is not enough for liability in itself, and there must be acts of a tortious character in carrying it into execution"); W. Prosser, Law of Torts § 46, p. 293 (4th ed. 1971) ("It is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable" (footnotes omitted)); *Satin* v. *Satin*, 69 App. Div. 2d 761, 762, 414 N. Y. S. 2d 570 (1979) (Memorandum Decision) ("There is no tort of civil conspiracy in and of itself. There must first be pleaded specific wrongful acts which might constitute an independent tort"); *Cohen* v. *Bowdoin,* 288 A. 2d 106, 110 (Me. 1972) ("'[C]onspiracy' fails as the basis for the imposition of civil liability absent the *actual commission* of some *independently recognized tort;* and when such separate tort has been committed, it is *that tort,* and not the fact of combination, which is the foundation of the civil liability"); *Earp* v. *Detroit,* 16 Mich. App. 271, 275, 167 N. W. 2d 841, 845 (1969) ("Recovery may be had from parties on the theory of concerted action as long as the elements of the separate and actionable tort are properly proved"); *Mills* v. *Hansell,* 378 F. 2d 53 (CA5 1967) *(per curiam)* (affirming dismissal of conspiracy to defraud claim because no defendant committed an actionable tort); *J. & C. Ornamental Iron Co.* v. *Watkins,* 114 Ga. App. 688, 691, 152 S. E. 2d 613, 615 (1966) ("[The plaintiff] must allege all the elements of a cause of action for the tort the same as would be required if there were no allegation of a conspiracy"); *Lesperance* v. *North American Aviation, Inc.,* 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873, 878 (1963) ("[C]onspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action" (internal quotation marks omitted)); *Middlesex Concrete Products & Excavating Corp.* v. *Carteret Indus. Assn.,* 37 N. J. 507, 516, 181 A. 2d 774, 779 (1962) ("[A] conspiracy cannot be made the subject of a civil action unless something has been done which, absent the conspiracy, would give a right of action"); *Chapman* v. *Pollock,* 148 F. Supp. 769, 772 (WD Mo. 1957) (holding that a plaintiff who charged the defendants with "conspiring to perpetrate an unlawful purpose" could not recover because the defendants committed no unlawful act); *Olmsted, Inc.* v. *Maryland Casualty Co.,* 218 Iowa 997, 998, 253 N. W. 804 (1934) ("[A] conspiracy cannot be the subject of a civil action unless something is done pursuant to it which, without the conspiracy, would give a right of action"); *Adler* v. *Fenton,* 24 How. 407, 410 (1861) ("[T]he act must be tortious, and there must be consequent damage").

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[6] Petitioner suggests that we should look to criminal, rather than civil, common-law principles to interpret the statute. We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), see *Salinas* v. *United States*, 522 U. S. 52, 63–65 (1997), a mere violation being all that is necessary for criminal liability. This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation. In other words, our task is to interpret §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone. The obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy.

Consistent with this principle, it was sometimes said that a conspiracy claim was not an independent cause of action, but was only the mechanism for subjecting co-conspirators to liability when one of their member committed a tortious act. *Royster* v. *Baker*, 365 S. W. 2d 496, 499, 500 (Mo. 1963) ("[A]n alleged conspiracy by or agreement between the defendants is not of itself actionable. Some wrongful act to the plaintiff's damage must have been done by one or more of the defendants, and the fact of a conspiracy merely bears on the liability of the various defendants as joint tortfeasors"). See *Halberstam* v. *Welch*, 705 F. 2d 472, 479 (CADC 1983) ("Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort").[7]

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[7] JUSTICE STEVENS quotes from some of the cases we have cited to suggest that the common law allowed recovery from harm caused by any overt act in furtherance of the conspiracy. See *post*, at 510–511, n. 5 (dissenting opinion). However, his quotations omit pertinent language. When read in context, it is clear that these passages refer to harm, not from any overt act, but only from overt acts that are themselves tortious. Compare *ibid.* with *Adler* v. *Fenton*, 24 How. 407, 410 (1861) ("[I]t must be shown that the defendants have done some wrong, that is, have violated some right of theirs . . . . [I]n these cases the act must be tortious"); *Royster* v. *Baker*, 365 S. W. 2d 496, 499 (Mo. 1963) ("Strictly speaking, there has been no distinct form of writ or action of conspiracy; but the action sounds in tort, and is of the nature of an action on the case upon the wrong done under the conspiracy alleged. The gist of the action is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy" (citations and internal quotation marks omitted)); *Lesperance* v. *North American Aviation, Inc.*, 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873, 878 (1963) ("'It is well settled that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action'"); *Earp* v. *Detroit*, 16 Mich. App. 271, 275, 167 N. W. 2d 841, 845 (1969) ("There is no civil action for conspiracy alone. It must be coupled with the commission of acts which damaged the plaintiff. Recovery may be had from parties on the theory of concerted action as long as the elements of the separate and actionable tort are properly proved" (citation omitted)); *Halberstam* v. *Welch*, 705 F. 2d

The principle that a civil conspiracy plaintiff must claim injury from an act of a tortious character was so widely accepted at the time of RICO's adoption as to be incorporated in the common understanding of "civil conspiracy." See Ballentine's Law Dictionary 252 (3d ed. 1969) ("It is the civil wrong resulting in damage, and not the conspiracy which constitutes the cause of action"); Black's Law Dictionary 383 (4th ed. 1968) ("[W]here, in carrying out the design of the conspirators, overt acts are done causing *legal* damage, the person injured has a right of action" (emphasis added)). We presume, therefore, that when Congress established in RICO a civil cause of action for a person "injured . . . by reason of" a "conspir[acy]," it meant to adopt these well-established common-law civil conspiracy principles.

JUSTICE STEVENS does not challenge our view that Congress meant to incorporate common-law principles when it adopted RICO. Nor does he attempt to make an affirmative case from the common law for his reading of the statute by pointing to a case in which there was (a) an illegal agreement; (b) injury proximately caused to the plaintiff by a nontortious overt act in furtherance of the agreement; and (c) recovery by the plaintiff. See *post,* at 508. Instead, he argues only that courts, authoritative commentators, and even dictionaries repeatedly articulated a rule with no meaning or application.[8] We find this argument to be implausible

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472, 479 (CADC 1983) (stating that civil conspiracy requires "an overt tortious act in furtherance of the agreement that causes injury. . . . Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability for the underlying tort").

[8] We disagree, moreover, with JUSTICE STEVENS' interpretation of the grounds for decision in some of the cases we have cited. For example, JUSTICE STEVENS reads *Mills* v. *Hansell,* 378 F. 2d 53 (CA5 1967) *(per curiam),* and *Chapman* v. *Pollock,* 148 F. Supp. 769, 772 (WD Mo. 1957), to deny recovery for conspiracy because the defendants had not entered into an unlawful agreement. See *post,* at 508–509. We think the opinions, and the language cited from these opinions by JUSTICE STEVENS,

and, accordingly, understand RICO to adopt the common-law principles we have cited. Interpreting the statute in a way that is most consistent with these principles, we conclude that injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO, see n. 7, *supra*, is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d). As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by *any* act in furtherance of a conspiracy that might have caused the plaintiff injury. Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an "ac[t] of a tortious character," see 4 Restatement (Second) of Torts § 876, Comment *b*, meaning an act that is independ-

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make clear that recovery was denied because the defendants had committed no actionable tort, regardless of whether they agreed to commit any such act. See *ibid.* Likewise, JUSTICE STEVENS reads *J. & C. Ornamental Iron Co.* v. *Watkins*, 114 Ga. App. 688, 691, 152 S. E. 2d 613, 615 (1966), to deny recovery because the plaintiff had suffered no injury. However, in that case, the plaintiff's conspiracy claim was predicated on several alleged torts including fraud, trespass, and malicious interference. *Ibid.* While the court held that the plaintiff could not recover for conspiracy to maliciously interfere because he had suffered no injury, the plaintiff's remaining conspiracy allegations were insufficient because the plaintiff did not allege "all the elements of a cause of action for the tort the same as would be required if there were no allegation of a conspiracy." *Ibid.* Further, JUSTICE STEVENS chides us for citing cases in which the court allowed recovery. But in two of these cases the court explicitly grounded its decision on the fact that the plaintiff had identified an actionable independent tort on which the conspiracy claim could be based. See *Cohen* v. *Bowdoin*, 288 A. 2d 106, 110 (Me. 1972) ("[I]f [the plaintiff's conspiracy claim] is to be upheld as stating a claim upon which relief can be granted, it must be on the ground that the complaint sufficiently alleges the actual commission of the separate and independent tort of defamation against the plaintiff"); *Middlesex Concrete Products & Excavating Corp.* v. *Carteret Indus. Assn.*, 37 N. J. 507, 516, 181 A. 2d 774, 779 (1962) (holding that the plaintiffs stated a claim for conspiracy because they alleged an actionable tort). In short, we think that there is ample evidence of the common-law rule we have cited.

ently wrongful under RICO. The specific type of act that is analogous to an act of a tortious character may depend on the underlying substantive violation the defendant is alleged to have committed.[9] However, respondents' alleged overt act in furtherance of their conspiracy is not independently wrongful under any substantive provision of the statute. Injury caused by such an act is not, therefore, sufficient to give rise to a cause of action under § 1964(c).[10]

Petitioner challenges this view of the statute under the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous. He asserts that under our view of the statute, any person who had a claim for a violation of § 1962(d) would necessarily have a claim for a violation of § 1962(a), (b), or (c). However, contrary to petitioner's assertions, our interpretation of § 1962(d) does not render it mere surplusage. Under our interpretation, a plaintiff could, through a § 1964(c) suit for a violation of

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[9] For example, most courts of appeals have adopted the so-called investment injury rule, which requires that a plaintiff suing for a violation of § 1962(a) allege injury from the defendant's "use or invest[ment]" of income derived from racketeering activity, see § 1962(a). See, *e. g., Crowe* v. *Henry,* 43 F. 3d 198, 205 (CA5 1995); *Vemco, Inc.* v. *Camardella,* 23 F. 3d 129, 132 (CA6) (collecting cases), cert. denied, 513 U. S. 1017 (1994). Although we express no view on this issue, arguably a plaintiff suing for a violation of § 1962(d) based on an agreement to violate § 1962(a) is required to allege injury from the "use or invest[ment]" of illicit proceeds.

[10] Respondents argue that a § 1962(d) claim must be predicated on an *actionable* violation of §§ 1962(a)–(c). However, the merit of this view is a different (albeit related) issue from the one on which we granted certiorari, namely, whether a plaintiff can bring a § 1962(d) claim for injury flowing from an overt act that is not an act of racketeering. Therefore, contrary to JUSTICE STEVENS' suggestion, see *post,* at 511–512, we do not resolve whether a plaintiff suing under § 1964(c) for a RICO conspiracy must allege an actionable violation under §§ 1962(a)–(c), or whether it is sufficient for the plaintiff to allege an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused him injury.

§ 1962(d), sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962.

## III

We conclude, therefore, that a person may not bring suit under § 1964(c) predicated on a violation of § 1962(d) for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

For the purpose of decision, I assume—as I think the Court does—that petitioner has alleged an injury proximately caused by an overt act in furtherance of a conspiracy that violated 18 U. S. C. § 1962(d). In my judgment, the plain language of the Racketeer Influenced and Corrupt Organizations Act (RICO) makes it clear that petitioner therefore has a cause of action under § 1964(c), whether or not the overt act is a racketeering activity listed in § 1961(1). The common-law civil conspiracy cases relied upon by the Court prove nothing to the contrary.

A "conspiracy" is an illegal agreement. There is, of course, a difference between the question whether an agreement is illegal and the question whether an admittedly illegal agreement gives rise to a cause of action for damages. Section 1962(d), which makes RICO conspiracies unlawful, addresses the former question;[1] § 1964(c), which imposes civil liability, concerns the latter. Section 1964(c) requires a person to be "injured in his business or property" by a violation before bringing an action for damages. And because that kind of injury only results from some form of overt act in furtherance of the conspiracy, liability under § 1964(c) naturally requires injury via an overt act.[2] But there is nothing in either § 1962(d) or § 1964(c) requiring the overt act to be a racketeering activity as defined in § 1961(1).[3]

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[1] Those who participate in an illegal agreement to violate the substantive provisions of § 1962(a), (b), or (c) have engaged in a conspiracy in violation of § 1962(d). See *Salinas* v. *United States*, 522 U. S. 52, 63–65 (1997). Although "[t]here is no requirement of some overt act" to violate § 1962(d), *id.*, at 63, that, of course, does not mean that an agreement alone gives rise to civil liability under § 1964(c).

The Court's central premise is that common-law civil conspiracy cases support the notion that liability cannot be imposed unless the overt act that furthered the conspiracy and harmed the plaintiff was a *particular kind* of overt act, namely, an act of a tortious character. But the cases cited by the Court do not support that point. First, no case cited by the majority actually parallels the Court's premise. That is, no case involved a situation in which (a) there was an illegal agreement, (b) there was an injury to the plaintiff proximately caused by an overt act in furtherance of that agreement, but (c) there was a refusal to impose civil liability because the overt act was not itself tortious.

Of the dozen cases cited by the Court, *ante,* at 501–503, half of them rejected liability because they did not satisfy condition (a) above, *i. e.*, there was either no agreement or nothing illegal about the agreement that was made. See *Satin* v. *Satin,* 69 App. Div. 2d 761, 762, 414 N. Y. S. 2d 570 (1979) (Memorandum Decision) ("Here, the only such wrongful action is pleaded against [one defendant] alone. . . . In any event, it is doubtful that there could here be a conspiracy between this individual and his own corporation"); *Mills* v. *Hansell,* 378 F. 2d 53, 54 (CA5 1967) *(per curiam)* ("[W]e feel that the able trial judge correctly concluded that . . .

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[2] Of course, under *Holmes* v. *Securities Investor Protection Corporation,* 503 U. S. 258, 268 (1992), the overt act must be the proximate cause of the plaintiff's injury.

[3] "[R]acketeering activity" is defined in § 1961(1) to include a slew of state and federal crimes such as murder, bribery, arson, and extortion.

there was no misconduct on the part of [the defendants]"); *Lesperance* v. *North American Aviation, Inc.*, 217 Cal. App. 2d 336, 346, 31 Cal. Rptr. 873, 878 (1963) ("[E]mployer . . . had the right (so far as appears) to terminate [plaintiff's] services without committing a civil wrong"); *Chapman* v. *Pollock*, 148 F. Supp. 769, 772 (WD Mo. 1957) ("The fatal defect in plaintiff's action for conspiracy is that the act committed by defendants . . . was lawful in its nature, . . . and violated no right of plaintiff"); *Olmsted, Inc.* v. *Maryland Casualty Co.*, 218 Iowa 997, 1003, 253 N. W. 804, 807 (1934) ("A conspiracy is not established by the record. There is no direct evidence that such a conspiracy was formed. A conspiracy cannot be inferred from the record, because nothing was done by the alleged conspirators which was unlawful"); *Royster* v. *Baker*, 365 S. W. 2d 496, 500 (Mo. 1963) ("[T]he petition does no more than allege that the defendants agreed, or if the term is preferred, conspired, to accomplish lawful acts in a lawful manner").

Three more cases refused to impose liability because condition (b) was missing; that is, because the plaintiff did not actually suffer any harm. See *Earp* v. *Detroit*, 16 Mich. App. 271, 280–282, 167 N. W. 2d 841, 847–848 (1969) (Plaintiff waived any cause of action for conspiracy to invade his privacy by disclosing private information); *J. & C. Ornamental Iron Co.* v. *Watkins*, 114 Ga. App. 688, 691–692, 152 S. E. 2d 613, 615 (1966) ("Plaintiff does not allege that it . . . was injured in any way. . . . [T]he petition contains no allegations of fact showing that plaintiff was injured in any way . . . . Thus the petition fails to state a cause of action upon any theory"); *Adler* v. *Fenton*, 24 How. 407, 411–413 (1861). The remaining three cases found that the plaintiff *did* state a cause of action and therefore the court did *not* refuse to impose liability on that ground. See *Cohen* v. *Bowdoin*, 288 A. 2d 106, 110 (Me. 1972) ("We decide that the complaint states a claim upon which relief can be granted"); *Middlesex Concrete Products & Excavating Corp.* v. *Carteret Indus.*

*Assn.*, 37 N. J. 507, 516, 181 A. 2d 774, 780 (1962) ("[S]o much of defendants' motion as sought a dismissal of the complaint as being insufficient in law must fail," but sustaining defendants' unrelated privilege defense); *Halberstam* v. *Welch*, 705 F. 2d 472, 489 (CADC 1983). The cases cited, in short, simply do not do the work the Court would have them do.[4]

Furthermore, at least some of the cases cited by the Court speak generally of harm via any overt act, and not exclusively of tortious acts.[5] Indeed, some of the sources cited recognize that, at least in certain instances, the agreement *itself* can give rise to liability for civil conspiracy.[6] And of the nine cases cited in which liability is rejected for failure to state a cause of action, four are the opinions of intermediate state courts and one is the three-page opinion of a Federal District Court—hardly strong evidence of the "widely accepted" premise on which the Court relies. *Ante,* at 501. Thus, the cases cited by the Court do not at all place its conclusion on any firm footing.

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[4] The Court suggests that three of the cases cited deny recovery because there was no actionable tort—and not, as I have suggested, because there was no illegal agreement or because there was no injury. See *ante*, at 504–505, n. 8. At best, the Court's reading only demonstrates that in these cases the question whether the harmful overt act was a tort, on the one hand, and the question whether there was any illegal agreement or harm, on the other hand, are questions of overlapping substance. To the extent that is true, however, the point does not support the Court's view. Rather, it only proves that the cases cited do not parse out elements (a), (b), and (c) as the Court suggests they do. Moreover, as I stated at the outset, both the Court and I assume that there has been an illegal conspiracy in this case. If the cases the Court cites show that there was no illegal agreement at all because there was no actionable tort, then the cases cited by the Court simply contradict the central premise of the present case, and are therefore inapposite.

[5] See *Earp* v. *Detroit*, 16 Mich. App. 271, 275, 167 N. W. 2d 841, 845 (1969) ("There is no civil action for conspiracy alone. . . . It must be coupled with the commission of acts which damaged the plaintiff"); *Lesperance* v. *North American Aviation, Inc.*, 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873, 878 (1963) ("'It is the wrong done and the damage suffered pursuant to . . . the conspiracy itself . . . . [T]he complaint must state facts which show that a civil wrong was done'"); *Chapman* v. *Pollock*, 148 F. Supp. 769, 772 (WD Mo. 1957) ("There can be no recovery for the simple existence of a civil conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy. . . . Unless something is actually done by the conspirators pursuant to their combination . . . no civil action lies against anyone"); *Adler* v. *Fenton*, 24 How. 407, 410 (1861) ("[I]t must be shown that the defendants have done some wrong"); *Royster* v. *Baker*, 365 S. W. 2d 496, 499 (Mo. 1963) ("The gist of the action is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy"); *Halber-*

Nevertheless, based on its understanding of the common law, the Court concludes that "a RICO conspiracy plaintiff [must] allege injury from an act that is analogous to an 'ac[t] of a tortious character.'" *Ante,* at 505. Even assuming that statement is correct, though, it is not at all clear to me why an overt act that "injure[s]" a person "in his business or property" (as § 1964(c) requires) would not be "analogous to an 'ac[t] of a tortious character'" simply because the overt act is not listed in § 1961(1). Nor do I understand why the

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*stam* v. *Welch,* 705 F. 2d 472, 487 (CADC 1983) ("[A] conspiracy requires: an agreement to do an unlawful act or a lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act").

[6] See *Cohen* v. *Bowdoin,* 288 A. 2d 106, 110, n. 4 (Me. 1972) ("We are aware that in particular extraordinary circumstances there has been recognized the existence of a separate self-sufficient and independent tort of 'conspiracy,' as a substantive basis of civil liability"); *Halberstam,* 705 F. 2d, at 477, n. 7; W. Prosser, Law of Torts § 46, p. 293 (4th ed. 1971) ("[I]t now seems generally agreed . . . that there are certain types of conduct, such as boycotts, in which the element of combination adds such a power of coercion, undue influence or restraint of trade, that it makes unlawful acts which one man alone might legitimately do. It is perhaps pointless to debate whether in such a case the combination or conspiracy becomes itself the tort, or whether it merely gives a tortious character to the acts done in furtherance of it. On either basis, it is the determining factor in liability"). See also *Snipes* v. *West Flagler Kennel Club, Inc.,* 105 So. 2d 164, 165–167, and n. 1 (Fla. 1958), where the court upheld liability *exclusively* on precisely that premise.

only qualifying "tortious act" must be "an act that is *independently wrongful under RICO.*" *Ante,* at 505–506 (emphasis added).

And if one assumes further that the Court is correct to say that the only qualifying "'ac[t] of a tortious character'" is "an act that is independently wrongful under RICO," the analogy does not actually support what the Court has held. The majority holds that § 1964(c) liability could be imposed if the overt acts injuring the plaintiff are among those racketeering activities listed in § 1961(1)—such as murder, bribery, arson, and extortion. Racketeering activities, however, are *not* "independently wrongful under RICO." They are, of course, independently wrongful under other provisions of state and federal criminal law, but RICO does not make racketeering activity *itself* wrongful under the Act. The only acts that are "independently wrongful under RICO" are violations of the provisions of § 1962. Thus, even accepting the Court's own analogy, if petitioner were harmed by predicate acts defined in § 1961(1), that still would not, by itself, give rise to a cause of action under § 1964(c). Only if those racketeering activities *also* constituted a violation of § 1962(a), (b), or (c) would petitioner be harmed by "an act that is independently wrongful under RICO." And, of course, if petitioner were already harmed by conduct covered by one of those provisions, he would hardly need to use § 1962(d)'s conspiracy provision to establish a cause of action.

* * *

The plain language of RICO makes it clear that petitioner's civil cause of action under § 1964(c) for a violation of § 1962(d) does not require that he be injured in his business or property by any particular kind of overt act in furtherance of the conspiracy. The Court's recitation of the common law of civil conspiracy does not prove otherwise, and, indeed, contradicts its own holding.

For these reasons, I respectfully dissent.

# CARMELL *v.* TEXAS

## CERTIORARI TO THE COURT OF APPEALS OF TEXAS, SECOND DISTRICT

No. 98–7540. Argued November 30, 1999—Decided May 1, 2000

In 1996, petitioner was convicted on 15 counts of committing sexual offenses against his stepdaughter from 1991 to 1995, when she was 12 to 16 years old. Before September 1, 1993, Tex. Code Crim. Proc. Ann., Art. 38.07, specified that a victim's testimony about a sexual offense could not support a conviction unless corroborated by other evidence or the victim informed another person of the offense within six months of its occurrence, but that, if a victim was under 14 at the time of the offense, the victim's testimony alone could support a conviction. A 1993 amendment allowed the victim's testimony alone to support a conviction if the victim was under 18. The validity of four of petitioner's convictions depends on which version of the law applies to him. Before the Texas Court of Appeals, he argued that the four convictions could not stand under the pre-1993 version of the law, which was in effect at the time of his alleged conduct, because they were based solely on the testimony of the victim, who was not under 14 at the time of the offenses and had not made a timely outcry. The court held that applying the 1993 amendment retrospectively did not violate the *Ex Post Facto* Clause, and the State Court of Criminal Appeals denied review.

*Held:* Petitioner's convictions on the counts at issue, insofar as they are not corroborated by other evidence, cannot be sustained under the *Ex Post Facto* Clause. Pp. 521–553.

(a) In *Calder* v. *Bull,* 3 Dall. 386, 390, Justice Chase stated that the proscription against *ex post facto* laws was derived from English common law well known to the Framers, and set out four categories of *ex post facto* criminal laws: "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*" The Court has repeatedly endorsed this understanding, including the fourth category. Both Justice Chase and the common-law treatise on which he drew heavily cited the case of Sir John Fenwick as an example of the fourth category. England charged Fenwick with high treason in the late 17th century, but, under an Act of Parliament, he could not be convicted without the testimony of two witnesses. Parliament passed a bill of attainder making the two-witness rule inapplicable, and Fenwick was convicted on the testimony of only one witness. Pp. 521–530.

(b) Article 38.07 plainly fits within *Calder's* fourth category. Requiring only the victim's testimony to convict, rather than that testimony plus corroborating evidence, is surely "less testimony required to convict" in any straightforward sense of those words. Indeed, the circumstances here parallel those of Fenwick's case. That Article 38.07 neither increases the punishment for, nor changes the elements of, the offense simply shows that the amendment does not fit within *Calder's* first or third categories. Pp. 530–531.

(c) The fourth category resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice. A law reducing the quantum of evidence required to convict is as grossly unfair as retrospectively eliminating an element of the offense, increasing punishment for an existing offense, or lowering the burden of proof. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life. Indeed, Fenwick's case itself illustrates this principle. Pp. 531–534.

(d) None of the reasons that the United States as *amicus* advances for abandoning the fourth category is persuasive. It asserts that the fact that neither Blackstone nor *ex post facto* clauses in Ratification-era state constitutions mention the fourth category shows that Justice Chase simply got it wrong. Accepting this assertion would require the Court to abandon the third category as well, for it is also not mentioned in any of those sources. And it does not follow from the fact that Fenwick was convicted by a bill of attainder that his case cannot also be an example of an *ex post facto* law. In fact, all of the specific examples that Justice Chase listed in *Calder* were passed as bills of attainder. Nor, as the United States and Texas argue, was the fourth category effectively cast out in *Collins* v. *Youngblood*, 497 U. S. 37, which actually held that it was a mistake to stray *beyond* *Calder's* four categories, not that the fourth category was itself mistaken. Pp. 534–539.

(e) Texas' additional argument that the fourth category is limited to laws that retrospectively alter the burden of proof is also rejected.

The Court's decision in *Cummings* v. *Missouri,* 4 Wall. 277, nowhere suggests that a reversal of the burden of proof is all the fourth category encompasses; and laws that lower the burden of proof and laws that reduce the quantum of evidence necessary to meet that burden are indistinguishable in all meaningful ways relevant to concerns of the *Ex Post Facto* Clause. Texas' assertion that Fenwick's case concerns only a reduction in the burden of proof is based on a mistaken historical premise. And its argument that the present case is controlled by *Hopt* v. *Territory of Utah,* 110 U. S. 574, and *Thompson* v. *Missouri,* 171 U. S. 380, is also unpersuasive. Unlike the witness competency rules at issue there, Article 38.07 is a sufficiency of the evidence rule. It does not merely regulate the mode in which the facts constituting guilt may be placed before the jury, but governs the sufficiency of those facts for meeting the burden of proof. Indeed, *Hopt* expressly *distinguished* witness competency laws from laws altering the amount or degree of proof needed for conviction. Moreover, a sufficiency of the evidence rule resonates with the interests to which the *Ex Post Facto* Clause is addressed, in particular the elements of unfairness and injustice in subverting the presumption of innocence. Pp. 539–547.

963 S. W. 2d 833, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, THOMAS, and BREYER, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post,* p. 553.

*Richard D. Bernstein,* by appointment of the Court, 527 U. S. 1051, argued the cause for petitioner. With him on the briefs were *Carter G. Phillips, Katherine L. Adams,* and *Paul A. Hemmersbaugh.*

*John Cornyn,* Attorney General of Texas, argued the cause for respondent. With him on the brief were *Andy Taylor,* First Assistant Attorney General, *Linda S. Eads,* Deputy Attorney General, *Gregory S. Coleman,* Solicitor General, and *Philip A. Lionberger,* Assistant Solicitor General.

*Beth S. Brinkmann* argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Waxman, Assistant Attorney*

*General Robinson, Deputy Solicitor General Dreeben,* and *Vicki S. Marani.**

JUSTICE STEVENS delivered the opinion of the Court.

An amendment to a Texas statute that went into effect on September 1, 1993, authorized conviction of certain sexual offenses on the victim's testimony alone. The previous statute required the victim's testimony plus other corroborating evidence to convict the offender. The question presented is whether that amendment may be applied in a trial for offenses committed before the amendment's effective date without violating the constitutional prohibition against state "*ex post facto*" laws.

## I

In 1996, a Texas grand jury returned a 15-count indictment charging petitioner with various sexual offenses against his stepdaughter. The alleged conduct took place over more than four years, from February 1991 to March 1995, when the victim was 12 to 16 years old. The conduct ceased after the victim told her mother what had happened. Petitioner was convicted on all 15 counts. The two most serious counts charged him with aggravated sexual assault, and petitioner was sentenced to life imprisonment on those two counts.

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**Robert P. Marcovitch* and *Barbara Bergman* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Kansas et al. by *Carla J. Stovall,* Attorney General of Kansas, and *Stephen R. McAllister,* State Solicitor, joined by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Jeffrey A. Modisett* of Indiana, *Richard P. Ieyoub* of Louisiana, *Jennifer M. Granholm* of Michigan, *Joe Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Charles M. Condon* of South Carolina, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington.

For each of the other 13 offenses (5 counts of sexual assault and 8 counts of indecency with a child), petitioner received concurrent sentences of 20 years.

Until September 1, 1993, the following statute was in effect in Texas:

> "A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense." Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon 1983).[1]

We emphasize three features of this law that are critical to petitioner's case.

The first is the so-called "outcry or corroboration" requirement. Under that provision, a victim's testimony can support a conviction for the specified offenses only if (1) that testimony is corroborated by other evidence, or (2) the victim informed another person of the offense within six months of its occurrence (an "outcry"). The second feature is the "child victim" provision, which is an exception to the outcry or corroboration requirement. According to this provision, if the victim was under 14 years old at the time of the alleged offense, the outcry or corroboration requirement does not apply and the victim's testimony alone can support a conviction—even without any corroborating evidence or outcry. The third feature is that Article 38.07 establishes a sufficiency of the evidence rule respecting the minimum quantum of evidence necessary to sustain a conviction. If the statute's requirements are not met (for example, by introducing only the uncorroborated testimony of a 15-year-old victim who did not make a timely outcry), a defendant cannot be convicted, and the court must enter a judgment of acquittal. See *Leday* v. *State*, 983 S. W. 2d 713, 725 (Tex. Crim. App. 1998); *Scoggan* v. *State*, 799 S. W. 2d 679, 683 (Tex. Crim. App. 1990). Conversely, if the requirements are satisfied, a conviction, in the words of the statute, "is supportable," and the case may be submitted to the jury and a conviction sustained. See *Vickery* v. *State*, 566 S. W. 2d 624, 626–627 (Tex. Crim. App. 1978); see also *Burnham* v. *State*, 821 S. W. 2d 1, 3 (Tex. Ct. App. 1991).[2]

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[1] The chapter and sections to which this statute refers cover all the charges contained in the 15-count indictment against petitioner. Chapter 21 includes the offense of indecency with a child; § 22.011 covers sexual assault; § 22.021 criminalizes aggravated sexual assault.

Texas amended Article 38.07, effective September 1, 1993. The amendment extended the child victim exception to victims under 18 years old.[3] For four of petitioner's counts, that amendment was critical. The "outcry or corroboration" requirement was not satisfied for those convictions;[4] they rested solely on the victim's testimony. Accordingly, the verdicts on those four counts stand or fall depending on whether the child victim exception applies. Under the old law, the exception would *not* apply, because the victim was more than 14 years old at the time of the alleged offenses. Under the new law, the exception would apply, because the victim was under 18 years old at that time. In short, the validity of four of petitioner's convictions depends on whether the old or new law applies to his case, which, in turn, depends on whether the *Ex Post Facto* Clause prohibits the application of the new version of Article 38.07 to his case.

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[2] Texas courts treat Article 38.07 as a sufficiency of the evidence rule, rather than as a rule concerning the competency or admissibility of evidence. Ordinarily, when evidence that should have been excluded is erroneously admitted against a defendant, the trial court's error is remedied on appeal by reversing the conviction and remanding for a new trial. See, *e. g., Miles* v. *State*, 918 S. W. 2d 511, 512 (Tex. Crim. App. 1996); *Beltran* v. *State*, 728 S. W. 2d 382, 389 (Tex. Crim. App. 1987). A trial court's failure to comply with the requirements of Article 38.07, by contrast, results not in a remand for a new trial, but in the reversal of conviction and remand for entry of an order of acquittal. See, *e. g., Scoggan*, 799 S. W. 2d, at 683. At oral argument, Texas agreed that the foregoing is an accurate description of Texas law. See Tr. of Oral Arg. 28–29, 32, 40–41.

[3] The new statute read in full:

"A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 18 years of age at the time of the alleged offense." Tex. Code Crim. Proc. Ann., Art. 38.07, as amended by Act of May 29, 1993, 73d Leg., Reg.

As mentioned, only 4 of petitioner's 15 total convictions are implicated by the amendment to Article 38.07; the other 11 counts—including the 2 convictions for which petitioner received life sentences—are uncontested. Six counts are uncontested because they were committed when the victim *was* under 14 years old, so his convictions stand even under the old law; the other five uncontested counts were committed after the new Texas law went into effect, so there could be no *ex post facto* claim as to those convictions. See

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Sess., ch. 900, § 12.01, 1993 Tex. Gen. Laws 3765, 3766, and Act of May 10, 1993, 73d Leg., Reg. Sess., ch. 200, § 1, 1993 Tex. Gen. Laws 387, 388.

[4] The victim did not make an outcry until March 1995, more than six months after the alleged offenses. Although the 1993 amendment to Article 38.07 extended the outcry period from six months to one year, see n. 3, *supra*, the victim's outcry did not come within that time period either. Accordingly, that change in the outcry provision is immaterial to this case.

The State argues that there is evidence corroborating the victim's testimony, so it does not help petitioner even if the old law applies. See Brief for Respondent 4, n. 2. Before the state court, however, petitioner argued that "there was nothing to corroborate [the victim's] version of events," 963 S. W. 2d 833, 836 (Tex. Ct. App. 1998), and that court accepted the contention as correct for the purposes of its decision. We do the same here.

*Weaver* v. *Graham,* 450 U. S. 24, 31 (1981) ("The critical question [for an *ex post facto* violation] is whether the law changes the legal consequences of acts completed before its effective date"). What are at stake, then, are the four convictions on counts 7 through 10 for offenses committed between June 1992 and July 1993 when the victim was 14 or 15 years old and the new Texas law was not in effect.

Petitioner appealed his four convictions to the Court of Appeals for the Second District of Texas in Fort Worth. See 963 S. W. 2d 833 (1998). Petitioner argued that under the pre-1993 version of Article 38.07, which was the law in effect at the time of his alleged conduct, those convictions could not stand, because they were based *solely* on the victim's testimony, and the victim was not under 14 years old at the time of the offenses, nor had she made a timely outcry.

The Court of Appeals rejected petitioner's argument. Under the 1993 amendment to Article 38.07, the court observed, petitioner could be convicted on the victim's testimony alone because she was under 18 years old at the time of the offenses. The court held that applying this amendment retrospectively to petitioner's case did not violate the *Ex Post Facto* Clause:

> "The statute as amended does not increase the punishment nor change the elements of the offense that the State must prove. It merely 'removes existing restrictions upon the competency of certain classes of persons as witnesses' and is, thus, a rule of procedure. *Hopt v. Utah,* 110 U. S. 574, 590 . . . (1884)." *Id.,* at 836.

The Texas Court of Criminal Appeals denied discretionary review. Because the question whether the retrospective application of a statute repealing a corroboration requirement has given rise to conflicting decisions,[5] we granted petitioner's *pro se* petition for certiorari, 527 U. S. 1002 (1999), and appointed counsel, *id.*, at 1051.

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[5] Compare *Utah* v. *Schreuder,* 726 P. 2d 1215 (Utah 1986) (finding *ex post facto* violation); *Virgin Islands* v. *Civil,* 591 F. 2d 255 (CA3 1979) (same), with *New York* v. *Hudy,* 73 N. Y. 2d 40, 535 N. E. 2d 250 (1988) (no *ex post*

## II

To prohibit legislative Acts "contrary to the first principles of the social compact and to every principle of sound legislation,"[6] the Framers included provisions they considered to be "perhaps greater securities to liberty and republicanism than any [the Constitution] contains."[7] The provisions declare:

> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." U. S. Const., Art. I, § 10.[8]

The proscription against *ex post facto* laws "necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." *Calder* v. *Bull,* 3 Dall. 386, 390 (1798) (Chase, J.). In *Calder* v. *Bull,* Justice Chase stated that the necessary explanation is derived from English common law well known to the Framers: "The expressions '*ex post facto laws,*' are *technical,* they had been in use long before the Revolution, and had acquired an appropriate meaning, by *Legislators, Lawyers,* and *Authors.*" *Id.*, at 391; see also *id.*, at 389 ("The prohibition . . . very probably arose from the knowledge, that *the Parliament of Great Britain* claimed and exercised a power to pass *such laws* . . ."); *id.*, at 396 (Paterson, J.). Specifically, the

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*facto* violation); *Murphy* v. *Sowders,* 801 F. 2d 205 (CA6 1986) (same); *Murphy* v. *Kentucky,* 652 S. W. 2d 69 (Ky. 1983) (same). See also *Idaho* v. *Byers,* 102 Idaho 159, 627 P. 2d 788 (1981) (judicial change in witness corroboration rule may not be applied retroactively); *Bowyer* v. *United States,* 422 A. 2d 973 (DC 1980) (same).

[6] The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison).

[7] *Id.*, No. 84, at 511 (A. Hamilton).

[8] Article I, § 9, cl. 3, has a similar prohibition applicable to Congress: "No Bill of Attainder or ex post facto Law shall be passed."

phrase *"ex post facto"* referred only to certain types of criminal laws. Justice Chase cataloged those types as follows:

> "I will state *what laws* I consider *ex post facto laws,* within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*" *Id.*, at 390 (emphasis in original).[9]

It is the fourth category that is at issue in petitioner's case.

The common-law understanding explained by Justice Chase drew heavily upon the authoritative exposition of one of the great scholars of the common law, Richard Wooddeson. See *id.*, at 391 (noting reliance on Wooddeson's treatise).[10]

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[9] Elsewhere in his opinion, Justice Chase described his taxonomy of *ex post facto* laws as follows:

"Sometimes [*ex post facto* laws] respected the crime, by declaring acts to be treason, which were not treason, when committed; at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit; at other times they inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offence." 3 Dall., at 389 (emphasis deleted).

[10] Wooddeson was well known for his treatise on British common law, A Systematical View of the Laws of England, which collected various lectures he delivered as the Vinerian Professor and Fellow of Magdalen College at Oxford. Though not as well known today, Justice Chase noted

Woodeson's classification divided *ex post facto* laws into three general categories: those respecting the crimes themselves; those respecting the legal rules of evidence; and those affecting punishment (which he further subdivided into laws creating a punishment and those making an existing punishment more severe).[11] See 2 R. Wooddeson, A Systematical View of the Laws of England 625–640 (1792) (Lecture 41) (hereinafter Wooddeson). Those three categories (the last of which was further subdivided) correlate precisely to *Calder*'s four categories. Justice Chase also used language in describing the categories that corresponds directly to Wooddeson's phrasing.[12] Finally, in four

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that Wooddeson was William Blackstone's successor, 3 Dall., at 391 (Blackstone held the Vinerian chair at Oxford until 1766), and his treatise was repeatedly cited in the years following the ratification by lawyers appearing before this Court and by the Court itself. See, *e. g., Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 562–563 (1819) (argument of Daniel Webster); *id.*, at 668, 676 (Story, J.); *Town of Pawlet* v. *Clark*, 9 Cranch 292, 326, 329 (1815) (Story, J.); *The Nereide*, 9 Cranch 388, 449 (1815) (Story, J.); *Cooper* v. *Telfair*, 4 Dall. 14, 16–17 (1800) (arguments of Edward Tilghman, Jared Ingersoll, and Alexander Dallas); *Hannum* v. *Spear*, 2 Dall. 291 (Err. App. Pa. 1795); *Glass* v. *Sloop Betsey*, 3 Dall. 6, 8 (1794).

[11] Specifically, in the former category Wooddeson included those laws that make "some innovation, or creat[e] some forfeiture or disability, not incurred in the ordinary course of law." 2 R. Wooddeson, A Systematical View of the Laws of England 638 (1792). In the latter category, he placed those laws that "imposed a sentence *more severe* than could have been awarded by the inferior courts." *Id.*, at 639. As examples of the former category Wooddeson cited the bills passed by Parliament that banished Lord Clarendon in 1669 and Bishop Atterbury in 1723. Those punishments were considered "innovation[s] . . . not incurred in the ordinary course of law" because banishment, at those times, was simply not a form of penalty that could be imposed by the courts. *Ibid.* See 11 W. Holdsworth, A History of English Law 569 (1938); Craies, The Compulsion of Subjects to Leave the Realm, 6 L. Q. Rev. 388, 396 (1890).

[12] See 2 Wooddeson 631 (referring to laws that "respec[t] the crime, determining those things to be treason, which by no prior law or adjudication could be or had been so declared"); *id.*, at 633–634 (referring to laws "respecting . . . the rules of *evidence* [rectifying] a deficiency of

footnotes in Justice Chase's opinion, he listed examples of various Acts of Parliament illustrating each of the four categories. See 3 Dall., at 389, nn. *, †, ‡, ||.[13] Each of these examples is exactly the same as the ones Wooddeson himself used in his treatise. See 2 Wooddeson 629 (case of the Earl of Strafford); *id.*, at 634 (case of Sir John Fenwick); *id.*, at 638 (banishments of Lord Clarendon and of Bishop Atterbury); *id.*, at 639 (Coventry Act).

*Calder*'s four categories, which embraced Wooddeson's formulation, were, in turn, soon embraced by contemporary scholars. Joseph Story, for example, in writing on the *Ex Post Facto* Clause, stated:

> "The general interpretation has been, and is, . . . that the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or whereby the act, if a crime, is aggravated in enormity, or punishment; or whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed." 3 Commentaries on the Constitution of the United States § 1339, p. 212 (1833).

James Kent concurred in this understanding of the Clause:

> "[T]he words *ex post facto laws* were technical expressions, and meant every law that made an act done before the passing of the law, and which was innocent when done, criminal; or which aggravated a crime, and

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legal proof" created when only one witness was available but "a statute then lately made requiring two witnesses" had been in effect); *id.*, at 638 (describing "acts of parliament, which principally affect *the punishment*, making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law"); *id.*, at 639 (referring to instances where "the legislature . . . imposed a sentence *more severe* than could have been awarded by the inferior courts"). Cf. n. 9, *supra*.

[13] The instances cited were the case of the Earl of Strafford, the case of Sir John Fenwick, the banishments of Lord Clarendon and of Bishop Atterbury, and the Coventry Act.

> made it greater than it was when committed; or which changed the punishment, and inflicted a greater punishment than the law annexed to the crime when committed; or which altered the legal rules of evidence, and received less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." 1 Commentaries on American Law 408 (3d ed. 1836) (Lecture 19).

This Court, moreover, has repeatedly endorsed this understanding, including, in particular, the fourth category (sometimes quoting Chase's words verbatim, sometimes simply paraphrasing). See *Lynce* v. *Mathis*, 519 U. S. 433, 441, n. 13 (1997); *Dobbert* v. *Florida*, 432 U. S. 282, 293 (1977); *Malloy* v. *South Carolina*, 237 U. S. 180, 183–184 (1915); *Mallett* v. *North Carolina*, 181 U. S. 589, 593–594 (1901); *Thompson* v. *Missouri*, 171 U. S. 380, 382, 387 (1898); *Hawker* v. *New York*, 170 U. S. 189, 201 (1898) (Harlan, J., dissenting); *Gibson* v. *Mississippi*, 162 U. S. 565, 589–590 (1896); *Duncan* v. *Missouri*, 152 U. S. 377, 382 (1894); *Hopt* v. *Territory of Utah*, 110 U. S. 574, 589 (1884); *Kring* v. *Missouri*, 107 U. S. 221, 228 (1883), overruled on other grounds, *Collins* v. *Youngblood*, 497 U. S. 37 (1990); *Gut* v. *State*, 9 Wall. 35, 38 (1870); *Ex parte Garland*, 4 Wall. 333, 390–391 (1867) (Miller, J., dissenting); *Cummings* v. *Missouri*, 4 Wall. 277, 325–326, 328 (1867). State courts, too, in the years following *Calder*, adopted Justice Chase's four-category formulation. See *Boston & Gunby* v. *Cummins*, 16 Ga. 102, 106 (1854); *Martindale* v. *Moore*, 3 Blackf. 275, 277 (Ind. 1833); *Davis* v. *Ballard*, 24 Ky. 563, 578 (1829); *Strong* v. *State*, 1 Blackf. 193, 196 (Ind. 1822); *Dickinson* v. *Dickinson*, 7 N. C. 327, 330 (1819); see also *Woart* v. *Winnick*, 3 N. H. 473, 475 (Super. Ct. 1826).[14]

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[14] The reception given the four categories contrasts with that given to *Calder*'s actual holding—that the *Ex Post Facto* Clause applies only to criminal laws, not to civil laws. The early criticism levied against that holding, see, *e. g.*, *Satterlee* v. *Matthewson*, 2 Pet. 380, 416, 681–687 (App. I)

## III

As mentioned earlier, Justice Chase and Wooddeson both cited several examples of *ex post facto* laws, and, in particular, cited the case of Sir John Fenwick as an example of the fourth category. To better understand the type of law that falls within that category, then, we turn to Fenwick's case for preliminary guidance.

Those who remained loyal to James II after he was deposed by King William III in the Revolution of 1688 thought their opportunity for restoration had arrived in 1695, following the death of Queen Mary. 9 T. Macaulay, History of England 31 (1899) (hereinafter Macaulay). Sir John Fenwick, along with other Jacobite plotters including George Porter and Cardell Goodman, began concocting their scheme in the spring of that year, and over the next several months the original circle of conspirators expanded in number. *Id.*, at 32, 47–48, 109–110. Before the conspirators could carry out their machinations, however, three members of the group disclosed the plot to William. *Id.*, at 122–125. One by one, the participants were arrested, tried, and convicted of treason. *Id.*, at 127–142. Fenwick, though, remained in hiding while the rest of the cabal was brought to justice. During that time, the trials of his accomplices revealed that there were only two witnesses among them who could prove Fenwick's guilt, Porter and Goodman. *Id.*, at 170–171. As luck would have it, an act of Parliament proclaimed that two witnesses were necessary to convict a person of high treason. See An Act for Regulateing of Tryals in

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(1829) (Johnson, J., concurring); *Stoddart* v. *Smith*, 5 Binn. 355, 370 (Pa. 1812) (Brackenridge, J.), was absent with respect to the four categories. Although Justice Chase's opinion may have somewhat dampened the appetite for further debate in the courts, that consideration would not necessarily have an effect on scholarly discourse, nor does it explain why judges would be reluctant to express criticism of the four categories, yet harbor no compunction when it came to criticizing the actual holding of the Court.

Cases of Treason and Misprision of Treason, 7 & 8 Will. III, ch. 3, §2 (1695–1696), in 7 Statutes of the Realm 6 (reprint 1963).[15] Thus, Fenwick knew that if he could induce either Porter or Goodman to abscond, the case against him would vanish. 9 Macaulay 171.

Fenwick first tried his hand with Porter. Fenwick sent his agent to attempt a bribe, which Porter initially accepted in exchange for leaving for France. But then Porter simply pocketed the bribe, turned in Fenwick's agent (who was promptly tried, convicted, and pilloried), and proceeded to testify against Fenwick (along with Goodman) before a grand jury. *Id.*, at 171–173. When the grand jury returned an indictment for high treason, Fenwick attempted to flee the country himself, but was apprehended and brought before the Lord Justices in London. Sensing an impending conviction, Fenwick threw himself on the mercy of the court and offered to disclose all he knew of the Jacobite plotting, aware all the while that the judges would soon leave the city for their circuits, and a delay would thus buy him a few weeks time. *Id.*, at 173–174.

Fenwick was granted time to write up his confession, but rather than betray true Jacobites, he concocted a confession calculated to accuse those loyal to William, hoping to introduce embarrassment and perhaps a measure of instability to the current regime. *Id.*, at 175–178. William, however, at once perceived Fenwick's design and rejected the confession, along with any expectation of mercy. *Id.*, at 178–

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[15] That Act read, in relevant part:

"And bee it further enacted That . . . noe Person or Persons whatsoever shall bee indicted tryed or attainted of High Treason . . . but by and upon the Oaths and Testimony of Two lawfull Witnesses either both of them to the same Overtact or one of them to one and another of them to another Overtact of the same Treason unlesse the Party indicted and arraigned or tryed shall willingly without violence in open Court confesse the same or shall stand Mute or refuse to plead or in cases of High Treason shall peremptorily challenge above the Number of Thirty five of the Jury . . . ."

180, 194. Though his contrived ploy for leniency was unsuccessful in that respect, it proved successful in another: during the delay, Fenwick's wife had succeeded in bribing Goodman, the other witness against him, to leave the country. *Id.*, at 194–195.[16]

Without a second witness, Fenwick could not be convicted of high treason under the statute mentioned earlier. For all his plotting, however, Fenwick was not to escape. After Goodman's absence was discovered, the House of Commons met and introduced a bill of attainder against Fenwick to correct the situation produced by the combination of bribery and the two-witness law. *Id.*, at 198–199. A lengthy debate ensued, during which the Members repeatedly discussed whether the two-witness rule should apply.[17] Ultimately, the bill passed by a close vote of 189 to 156, *id.*, at 210, notwithstanding the objections of Members who (foreshadowing *Calder*'s fourth category) complained that Fenwick was being attainted "upon less Evidence" than would be required under the two-witness law,[18] and despite the repeated importuning against the passing of an *ex post facto* law.[19] The bill then was taken up and passed by the

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[16] This time, Fenwick's wife handled the bribe with a deftness lacking in the first attempt. Not only was Goodman (popularly called "Scum Goodman," see 9 Macaulay 32) an easier target, but Lady Fenwick's agent gave Goodman an offer he couldn't refuse: abscond and be rewarded, or have his throat cut on the spot. *Id.*, at 195. Goodman's instinct for self-preservation prevailed, and the agent never parted company with him until they both safely reached France. *Ibid.*

[17] See, *e. g.*, The Proceedings Against Sir John Fenwick Upon a Bill of Attainder for High Treason 40 (1702) (hereinafter Proceedings) (" 'Tis Extraordinary that you bring Sir *John Fenwick*, here to Answer for Treason, when . . . you have but one Witness to that Treason . . . . Treason be not Treason unless it be proved by two Witnesses . . ."); *id.*, at 103 ("It hath been objected, That there ought to be two Witnesses, by the late Statute"); *id.*, at 227 ("I do take it to be part of the Law of the Land, That no Man should be condemned for Treason without two Witnesses"); *id.*, at 256–257 ("[I]f we sit here to Judge, we sit to Judge him according to the Law of *England* . . . . Will you set up a Judgment . . . upon one Witness, when the Law says you shall have two; and after all, say 'tis a reasonable Proceeding?").

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[18] See, *e. g., id.,* at 270 ("I believe this House can't take away any Persons Life upon less Evidence than Inferiour Courts could do"); *id.,* at 288 ("Shall we that are the Supream Authority . . . go upon less Evidence to satisfie ourselves of Sir *John Fenwick's* Guilt, than other Courts?"); *id.,* at 317 ("I can't satisfie my self in my Conscience, and should think some misfortune might follow me and my Posterity, if I passed Sentence upon Sir *John Fenwick's* Life, upon less Evidence than the Law of *England* requires"); *id.,* at 342 ("But the Liberty of the People of *England* is very much concerned in the Revocation of that Act; and none of the Arguments that have been used can Convince me, That I ought to give Judgment upon less Evidence than is required by that Act").

[19] See, *e. g., id.,* at 145 ("I can't say, but those Persons, who in the last Sessions of Parliament, were Imprisoned by an Act *Ex Post Facto,* and subsequent to the Fact Complained of, yet when it was passed into a Law, they were Legally Detained: but, I hope, I may take notice of their Case, as some kind of Reason against this, to the end that those Laws may not grow familiar, that they may not easily be obtained; because Precedents generally grow, and as that Law *Ex Post Facto,* extended to Liberty, so this extends to Life . . ."); *id.,* at 152–153 ("It would be too much at once to make a *subsequent Law* to condemn a Man to Death . . . . I am afraid none are safe if that be admitted, That a *subsequent Law* may take away a Man's Life . . ." (emphasis added)); *id.,* at 197 ("Sir, It hath been urged to you, of what ill Consequence it would be, and how much Injustice to make a Law to Punish a Man, *Ex post Facto* . . ."); *id.,* at 256 ("But how shall they Judge? By the Laws in being. . . . That you may Judge that to be Treason in this House, *that was not so by the Law before.* So that give me leave to say, therefore there is no such Power reserved to the Parliament, to Declare any thing Treason that is not Treason before" (emphasis added)); *id.,* at 282–283 ("[F]or according to your Law, no Man shall be declared Guilty of Treason, unless there be two Witnesses against him . . . . But how can a Man satisfie his own Conscience, to Condemn any Man by *a Law that is subsequent to the Fact?* For that is the Case . . ." (emphasis added)); *id.,* at 305 ("I think I may confidently affirm, there is not so much as one Precedent where a Person . . . was taken away from his Tryal, . . . and cut off extrajudicially by an Act made on purpose, *Ex post Facto*"); *id.,* at 331–332 ("Those Acts that have been made since, are made certainly to provide, That in no Case whatsoever, a Man should be so much as accused without two Witnesses

House of Lords, and the King gave his assent. *Id.*, at 214–225; see also An Act to Attaint Sir John Fenwick Baronet of High Treason, 8 Will. III, ch. 4 (1696). On January 28, 1697, Sir John Fenwick was beheaded. 9 Macaulay 226–227.

## IV

Article 38.07 is unquestionably a law "that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Under the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony *and* corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence. Under any commonsense understanding of *Calder*'s fourth category, Article 38.07 plainly fits. Requiring only the victim's testimony to convict, rather than the victim's testimony plus other corroborating evidence is surely "less testimony required to convict" in any straightforward sense of those words.

Indeed, the circumstances of petitioner's case parallel those of Fenwick's case 300 years earlier. Just as the relevant law in Fenwick's case required more than one witness' testimony to support a conviction (namely, the testimony of a second witness), Texas' old version of Article 38.07 required more than the victim's testimony alone to sustain a conviction (namely, other corroborating evidence).[20] And just like Fen-

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of the Treason. . . . Then this is a Law; *ex post facto*, and that hath been always condemned . . .").

[20] Texas argues that the corroborative evidence required by Article 38.07 "need not be more or different from the victim's testimony; it may be entirely cumulative of the victim's testimony." Brief for Respondent 19;

wick's bill of attainder, which permitted the House of Commons to convict him with less evidence than was otherwise required, Texas' retrospective application of the amendment to Article 38.07 permitted petitioner to be convicted with less than the previously required quantum of evidence. It is true, of course, as the Texas Court of Appeals observed, that "[t]he statute as amended does not increase the punishment nor change the elements of the offense that the State must prove." 963 S. W. 2d, at 836. But that observation simply demonstrates that the amendment does not fit within *Calder*'s first and third categories. Likewise, the dissent's remark that "Article 38.07 does not establish an element of the offense," *post*, at 559, only reveals that the law does not come within *Calder*'s first category. The fact that the amendment authorizes a conviction on less evidence than previously required, however, brings it squarely within the fourth category.

## V

The fourth category, so understood, resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice.[21]

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see also *post*, at 561, n. 6 (dissenting opinion). The trouble with that argument is that the same was true in Fenwick's case. The relevant statute there required the "Testimony of Two lawfull Witnesses *either both of them to the same Overtact* or one of them to one and another of them to another Overtact of the same Treason." See n. 15, *supra* (emphasis added).

[21] The Clause is, of course, also aimed at other concerns, "namely, that legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," *Miller* v. *Florida*, 482 U. S. 423, 430 (1987) (internal quotation marks omitted), and at reinforcing the separation of powers, see *Weaver* v. *Graham*, 450 U. S. 24, 29, n. 10 (1981). But those are not its only aims, and the absence of a reliance interest is not an argument in favor of abandoning the category itself. If it were, the same conclusion would follow for *Calder*'s third category (increases in punishment), as there are few, if any, reliance interests in planning future criminal activities based on the expectation of less severe repercussions.

Justice Chase viewed all *ex post facto* laws as "manifestly *unjust and oppressive.*" *Calder,* 3 Dall., at 391. Likewise, Blackstone condemned them as "cruel and unjust," 1 Commentaries on the Laws of England 46 (1765), as did every state constitution with a similar clause, see n. 25, *infra.* As Justice Washington explained in characterizing "[t]he injustice and tyranny" of *ex post facto* laws:

> "Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the State under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Ogden* v. *Saunders,* 12 Wheat. 213, 266 (1827).

In short, the *Ex Post Facto* Clause was designed as "an *additional* bulwark in favour of the personal security of the subject," *Calder,* 3 Dall., at 390 (Chase, J.), to protect against "the favorite and most formidable instruments of tyranny," The Federalist No. 84, p. 512 (C. Rossiter ed. 1961) (A. Hamilton), that were "often used to effect the most detestable purposes," *Calder,* 3 Dall., at 396 (Paterson, J.).

*Calder*'s fourth category addresses this concern precisely. A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof (see *infra,* at 540–544). In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end.[22] All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.[23]

Indeed, Fenwick's case is itself an illustration of this principle. Fenwick could claim no credible reliance interest in the two-witness statute, as he could not possibly have known that only two of his fellow conspirators would be able to testify as to his guilt, nor that he would be successful in bribing one of them to leave the country. Nevertheless, Parliament had enacted the two-witness law, and there was a profound unfairness in Parliament's retrospectively altering the very rules it had established, simply because those rules prevented the conviction of the traitor—notwithstanding the fact that Fenwick could not truly claim to be "innocent." (At least one historian has concluded that his guilt was clearly established, see 9 Macaulay 203–204, and the debate in the House of Commons bears out that conclusion, see, *e. g.*, Proceedings 219, 230, 246, 265, 289.) Moreover, the pertinent rule altered in Fenwick's case went directly to the general issue of guilt, lowering the minimum quantum of evidence required to obtain a conviction. The Framers, quite clearly, viewed such maneuvers as grossly unfair, and adopted the *Ex Post Facto* Clause accordingly.[24]

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[22] Lowering the burden of persuasion, to be sure, is not precisely the same thing as lowering (as a matter of law) the amount of evidence necessary to meet that burden. But it does not follow, as the dissent appears to think, that only the former subverts the presumption of innocence. *Post,* at 560–561 (opinion of GINSBURG, J.).

[23] We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. See *infra,* at 543–547. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard. Moreover, while the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force. Cf. *W. S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l,* 493 U. S. 400, 409 (1990).

## VI

The United States as *amicus* asks us to revisit the accuracy of the fourth category as an original matter. None of its reasons for abandoning the category is persuasive.

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[24] Fenwick's case also illustrates how such *ex post facto* laws can operate similarly to retrospective increases in punishment by adding to the coercive pressure to accept a plea bargain. When Fenwick was first brought before the Lord Justices, he was given an opportunity to make a confession to the King. Though he squandered the opportunity by authoring a plain contrivance, Fenwick could have reasonably assumed that a sincere confession would have been rewarded with leniency—the functional equivalent of a plea bargain. See 9 Macaulay 125. When the bill of attainder was taken up by the House of Commons, there is evidence that this was done to pressure Fenwick into making the honest confession he had failed to make before. See, *e. g.*, Proceedings 197 (" 'Tis a Matter of Blood, 'tis true, but I do not aim at this Gentleman's Life in it . . . all I Propose by it, is to get his Confession"); *id.*, at 235 ("[W]e do not aim at Sir *John Fenwick's* Blood, (God forbid we should) but at his Confession"); *id.*, at 255 ("Why, give me leave to say to you, 'tis a new way not known in *England*, that you will Hang a Man unless he will Confess or give Evidence . . ."). And before the House of Lords, Fenwick was explicitly threatened that unless he confessed, they would proceed to consider the bill against him. 9 Macaulay 218.

First, pointing to Blackstone's Commentaries and a handful of state constitutions cited by Justice Chase in *Calder*, see 3 Dall., at 391–392, the United States asserts that Justice Chase simply got it wrong with his four categories. Blackstone wrote: "There is still a more unreasonable method than this, which is called making of laws *ex post facto;* when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it . . . ." 1 Commentaries on the Laws of England, at 46 (emphasis in original). The *ex post facto* clauses in Ratification-era state constitutions to which Justice Chase cited are of a piece.[25] The United States directs our attention to the fact that none of these definitions mentions Justice Chase's fourth category.

All of these sources, though, are perfectly consistent with Justice Chase's first category of *ex post facto* laws. None of them is incompatible with his four-category formulation, unless we accept the premise that Blackstone and the state constitutions purported to express the *exclusive* definition of an *ex post facto* law. Yet none appears to do so on its face. And if those definitions were read as exclusive, the United

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[25] Massachusetts' clause read as follows: "Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." Constitution of Massachusetts, Pt. I, Art. 24 (1780), in 5 W. Swindler, Sources and Documents of United States Constitutions 95 (1975) (hereinafter Swindler). The Constitutions of Maryland and North Carolina used identical words: "That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made." Maryland Constitution, A Declaration of Rights, Art. 15 (1776), in 4 Swindler 373; North Carolina Constitution, A Declaration of Rights, Art. 24 (1776), in 7 Swindler 403. And Delaware's Declaration of Rights and Fundamental Rules, Art. 11 (1776), in 2 Swindler 198, stated, "That retrospective Laws, punishing Offenses committed before the Existence of such Laws, are oppressive and unjust and ought not to be made."

States' argument would run up against a more troubling obstacle, namely, that neither Blackstone nor the state constitutions mention *Calder's* third category either (increases in punishment). The United States, in effect, asks us to abandon two of *Calder's* categories based on the unsupported supposition that the Blackstonian and state constitutional definitions were exclusive, and upon the implicit premise that neither Wooddeson, Chase, Story, Kent, nor subsequent courts (state and federal) realized that was so. We think that simply stating the nature of the request demonstrates why it must be rejected.[26]

Next, the United States contends Justice Chase was mistaken to cite the case of Sir John Fenwick as an example of an *ex post facto* law, because it was actually a bill of attainder. Fenwick was indeed convicted by a bill of attainder, but it does not follow that his case cannot also be an example of an *ex post facto* law. Clearly, Wooddeson thought it was, see 2 Wooddeson 641, as did the House of Commons, see n. 19, *supra,* and we are aware of no rule stating that a single historical event can explain one, but not two, constitutional Clauses (actually, three Clauses, see Art. III, § 3 (Treason Clause)). We think the United States' observation simply underscores the kinship between bills of attainder and *ex post facto* laws, see *Nixon* v. *Administrator of General Services,* 433 U. S. 425, 468, n. 30 (1977); *United States* v. *Lovett,* 328 U. S. 303, 323 (1946) (Frankfurter, J., concurring); see also Z. Chafee, Three Human Rights in the Constitution of 1787, pp. 92–93 (1956) (hereinafter Chafee), which may explain why the Framers twice placed their respective prohibitions adjacent to one another. And if the United States means to argue that category four should be abandoned because its illustrative example was a bill of attainder, this would prove entirely too much, because *all* of the specific examples listed by Justice Chase were passed as bills of attainder.[27]

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[26] Nor does it help much to cite Justice Iredell's statement that *ex post facto* laws include those that "inflict a punishment for any act, which was innocent at the time it was committed; [or] increase the degree of punishment previously denounced for any specific offence," *Calder* v. *Bull,* 3 Dall. 386, 400 (1798). The argument still requires us to believe that Justice Iredell—and only Justice Iredell—got it right, and that all other authorities (now including Blackstone and the state constitutions) somehow missed the point.

Finally, both Texas and the United States argue that we have already effectively cast out the fourth category in *Collins* v. *Youngblood,* 497 U. S. 37 (1990). *Collins* held no such thing. That case began its discussion of the *Ex Post Facto* Clause by quoting verbatim Justice Chase's "now familiar opinion in *Calder*" and his four-category definition. *Id.,* at 41–42. After noting that "[e]arly opinions of the Court portrayed this as an exclusive definition of *ex post facto* laws," *id.,* at 42, the Court then quoted from our opinion in *Beazell* v. *Ohio,* 269 U. S. 167 (1925):

> "'It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post*

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[27] See An Act for the Attainder of Thomas Earle of Strafford of High Treason, 16 Car. I, ch. 38 (1640), in 5 Statutes of the Realm 177 (reprint 1963); An Act for Banishing and Disenabling the Earl of Clarendon, 19 & 20 Car. II, ch. 2 (1667–1668), in 5 Statutes of the Realm, at 628; An Act to Inflict Pains and Penalties on Francis (Atterbury) Lord Bishop of Rochester, 9 Geo. I, ch. 17 (1722); An Act to Prevent Malicious Maiming and Wounding (Coventry Act), 22 & 23 Car. II, ch. 1 (1670). While the bills against the Earl of Clarendon and Bishop Atterbury appear to be bills of pains and penalties, see Chafee 117, 136, as does the Coventry Act, see 2 Wooddeson 638–639, those are simply a subspecies of bills of attainder, the only difference being that the punishment was something less than death. See *Drehman* v. *Stifle,* 8 Wall. 595, 601 (1870).

> *facto.'"* *Collins,* 497 U. S., at 42 (quoting *Beazell,* 269 U. S., at 169–170).

*Collins* then observed in a footnote: "The *Beazell* definition omits the reference by Justice Chase in *Calder* v. *Bull,* to alterations in the 'legal rules of evidence.' As cases subsequent to *Calder* make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." 497 U. S., at 43, n. 3 (citations omitted). *Collins* then commented that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." *Id.,* at 43.

It seems most accurate to say that *Collins* is rather cryptic. While calling *Calder*'s four categories the "exclusive definition" of *ex post facto* laws, it also calls *Beazell*'s definition a "faithful" rendition of the "original understanding" of the Clause, even though that quotation omitted category four. And while *Collins* quotes a portion of *Beazell* omitting the fourth category, the immediately preceding paragraph in *Beazell* explains that the law at issue in that case did not change "[t]he quantum and kind of proof required to establish guilt," 269 U. S., at 170, a statement distinguishing, rather than overruling, *Calder*'s fourth category.

If *Collins* had intended to resurrect a long forgotten original understanding of the *Ex Post Facto* Clause shorn of the fourth category, we think it strange that it would have done so in a footnote. Stranger still would be its reliance on a single case from 1925, which did not even implicate, let alone purport to overrule, the fourth category, and which did not even mention Fenwick's case. But this Court does not discard longstanding precedent in this manner. Further still, *Collins* itself expressly overruled two of our prior cases; if the Court that day were intent on overruling part of *Calder* as well, it surely would have said so directly, rather than act in such an ambiguous manner.

The better understanding of *Collins'* discussion of the *Ex Post Facto* Clause is that it eliminated a doctrinal hitch that had developed in our cases, which purported to define the scope of the Clause along an axis distinguishing between laws involving "substantial protections" and those that are merely "procedural." Both *Kring* v. *Missouri*, 107 U. S. 221 (1883), and *Thompson* v. *Utah*, 170 U. S. 343 (1898)—the two cases *Collins* overruled—relied on just that distinction. In overruling them, the Court correctly pointed out, "the prohibition which may not be evaded is the one defined by the *Calder* categories." 497 U. S., at 46. Accordingly, *Collins* held that it was a mistake to stray *beyond Calder's* four categories, not that the fourth category was itself mistaken.[28]

## VII

Texas next argues that even if the fourth category exists, it is limited to laws that retrospectively alter the burden of proof (which Article 38.07 does not do). See also *post*, at 572 (dissenting opinion). It comes to this conclusion on the basis of two pieces of evidence. The first is our decision in *Cummings* v. *Missouri*, 4 Wall. 277 (1867). The second concerns Texas' historical understanding of Fenwick's case.

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[28] The dissent would have us dismiss our numerous and repeated invocations of the fourth category, see *supra*, at 525, because they were merely "mechanical . . . recitation[s]" in cases that did not depend on the fourth category. *Post*, at 568. Instead, the dissent would glean original meaning from *Beazell* v. *Ohio*, 269 U. S. 167 (1925), and *Collins* v. *Youngblood*, 497 U. S. 37 (1990). *Post*, at 567–568. First of all, the dissent is factually mistaken; *Cummings* v. *Missouri*, 4 Wall. 277 (1867), relied on the fourth category in invalidating the laws at issue there. See *infra* this page and 540–541. And *Hopt* v. *Territory of Utah*, 110 U. S. 574 (1884) (discussed *infra*, at 542–547), specifically *distinguished* category four. See *post*, at 570–571 ("*Hopt* . . . retain[ed] *Calder's* fourth category"). Second, as mentioned above, neither *Beazell* nor *Collins* relied on the fourth category, so it is not apparent why the dissent would place so much emphasis on those two cases that did not depend on category four.

*Cummings* v. *Missouri* addressed an *ex post facto* challenge to certain amendments to the Missouri State Constitution made in 1865. When read together, those amendments listed a series of acts deemed criminal (all dealing with the giving of aid or comfort to anyone engaged in armed hostility against the United States), and then declared that unless a person engaged in certain professions (*e. g.*, lawyers and clergymen) swore an oath of loyalty, he "shall, on conviction [for failing to swear the oath], be punished" by a fine, imprisonment, or both. *Id.*, at 279–281. We held that these provisions violated the *Ex Post Facto* Clause.

Writing for the Court, Justice Field first observed that "[b]y an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Id.*, at 325–326. The Court then held the amendments violated the *Ex Post Facto* Clause in all these respects: some of the offenses deemed criminal by the amendments were not criminal acts before then, *id.*, at 327–328; other acts were previously criminal, but now they carried a greater criminal sanction, *id.*, at 328; and, most importantly for present purposes, the amendments permitted conviction on less testimony than was previously sufficient, because they "subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable," *ibid.* The Court continued: "They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties." *Ibid.*

It is correct that *Cummings* held Missouri's constitutional amendments invalid under the fourth category because they reversed the burden of proof. But *Cummings* nowhere suggests that a reversal of the burden of proof is all the fourth category encompasses. And we think there is no good reason to draw a line between laws that lower the burden of proof and laws that reduce the quantum of evidence necessary to meet that burden; the two types of laws are indistinguishable in all meaningful ways relevant to concerns of the *Ex Post Facto* Clause. See *supra*, at 530–534; see also *Cummings*, 4 Wall., at 325 ("The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows").

As for Texas' second piece of evidence, it asserts that the law in Fenwick's case, requiring two witnesses to convict a person for high treason, traces its origins to the ancient Roman law concept known as the "rule of number," under which "the probative value of testimony would be increased if others testifying to the same facts swore an oath." Brief for Respondent 20. The "less testimony" to which Fenwick's case refers, the argument runs, concerns lowering the probative value required to convict, *i. e.*, a reduction in the burden of proof.

Even if that historical argument were correct, the same response to Texas' *Cummings*-based argument is applicable. But we think the historical premise is mistaken. If the testimony of one witness rather than two truly reflected a less credible showing, and if the House of Commons truly thought it labored under a lesser burden of proof, then one would expect some sort of reference to that in Fenwick's case. Yet the few direct references to the burden of proof that were made during the debates are to the contrary; they indicate something roughly the equivalent of a beyond-a-reasonable-doubt standard.[29] And at least one Member expressly declared that the number of witnesses testifying bore no relationship to the overall credibility of the Crown's case.[30] It also appears that "[a]fter the middle of the 1600s there never was any doubt that the common law of England in jury trials rejected entirely" the Roman law concept of the rule of number. Wigmore, Required Numbers of Witnesses; A Brief History of the Numerical System in England, 15 Harv. L. Rev. 83, 93 (1901). Though the treason statute at issue in Fenwick's case, and related antecedent acts, have a superficial resemblance to the rule of number, those acts in fact reflected a concern with prior monarchical abuses relating to the specific crime of treason, rather than any vestigial belief that the number of witnesses is a proxy for probative value. *Id.*, at 100–101; see also 7 J. Wigmore, Evidence § 2037, pp. 353–354 (J. Chadbourn rev. 1978).

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[29] See, *e. g.*, Proceedings 75 ("If upon what I hear, I am of Opinion, he is notoriously Guilty, I shall freely pass the Bill. If I do so much as doubt that he is Guilty, according to the old Rule, *Quod dubitas ne feceris*

## VIII

Texas argues (following the holding of the Texas Court of Appeals) that the present case is controlled by *Hopt* v. *Territory of Utah*, 110 U. S. 574 (1884), and *Thompson* v. *Missouri*, 171 U. S. 380 (1898). In *Hopt*, the defendant was convicted of murder. At trial, the prosecution introduced the testimony of a convicted felon that tended to inculpate the defendant. Hopt objected to the competency of the witness on the basis of a law in place at the time of the alleged murder, which stated: " '[T]he rules for determining the competency of witnesses in civil actions are applicable also to criminal actions . . . .' " The relevant civil rules, in turn, specified that " 'all persons, without exception, . . . may be witnesses in any action or proceeding,' " but " 'persons against whom judgment has been rendered upon a conviction

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[where you doubt, do nothing], I shall not be for it . . ."). See also *Coffin* v. *United States*, 156 U. S. 432, 456 (1895).

[30] "[O]ne single Witness, if credited by Twelve Jury-men, is sufficient; and an Hundred Witnesses, if not so credited, is not sufficient to Convict a Person of a Capital Crime." Proceedings 210; see also *id.*, at 223–226.

for felony . . . shall not be witnesses.'" 110 U. S., at 587–588. After the date of the alleged offense, but prior to defendant's trial, the last provision (excluding convicted felons from being witnesses) was repealed.

The defendant argued that the retrospective application of the felon witness-competency provision violated the *Ex Post Facto* Clause. Because of the emphasis the parties (and the dissent) have placed on *Hopt,* it is worth quoting at length this Court's explanation for why it rejected the defendant's argument:

> "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; *nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.*
>
> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and *the quantity or the degree of proof necessary to establish his guilt,* all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the compe-

> tency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged." *Id.*, at 589–590 (emphases added).

*Thompson* v. *Missouri*, also relied upon by Texas, involved a similar *ex post facto* challenge to the retrospective application of a law permitting the introduction of expert handwriting testimony as competent evidence, where the rule in place at the time of the offense did not permit such evidence to be introduced. Mainly on the authority of *Hopt*, the Court rejected Thompson's *ex post facto* challenge as well.

Texas' reliance on *Hopt* is misplaced. Article 38.07 is simply not a witness competency rule.[31] It does not "simply enlarge the class of persons who may be competent to testify," and it does not "only remove existing restrictions upon the competency of certain classes of persons as witnesses." 110 U. S., at 589–590. Both before and after the amendment, the victim's testimony was competent evidence. Texas Rule of Criminal Evidence 601(a) already prescribes that "[e]very person is competent to be a witness except as otherwise provided in these rules," and Rule 601(a)(2) already contains its own provision respecting child witnesses.[32] As explained earlier, see *supra*, at 517–518, 531–533, Article 38.07 is a sufficiency of the evidence rule. As such, it does not merely "regulat[e] . . . the mode in which the facts constituting guilt may be placed before the jury," (Rule 601(a) already does that), but governs the sufficiency of those facts for meeting the burden of proof. Indeed, *Hopt* expressly *distinguished* witness competency laws from those laws that "alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." 110 U. S., at 589; see also *id.*, at 590 (felon witness law "leav[es] untouched . . . the amount or degree of proof essential to conviction").

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[31] We recognize that the Court of Appeals stated Article 38.07 "merely 'removes existing restrictions upon the competency of certain classes of persons as witnesses,'" 963 S. W. 2d, at 836 (quoting *Hopt*, 110 U. S., at 590); see *supra*, at 520. Whether a state law is properly characterized as falling under the *Ex Post Facto* Clause, however, is a federal question we determine for ourselves. Cf. *Lindsey* v. *Washington*, 301 U. S. 397, 400 (1937).

It is profitable, in this respect, to compare the statutes in *Hopt* and *Thompson* with the text of Article 38.07. The law in *Hopt* proscribed a " 'rul[e] for determining the competency of witnesses' " that stated " 'persons . . . convict[ed of a] felony . . . shall not be witnesses.' " 110 U. S., at 587–588. The statute in *Thompson*, similarly, specified that " 'comparison of a disputed writing . . . shall be permitted to be made by witnesses, and such writings . . . may be submitted to the court and jury as evidence.' " 171 U. S., at 381. Article 38.07, however, speaks in terms of whether "[a] conviction . . . is supportable on" certain evidence. It is Rule 601(a), not Article 38.07, that addresses who is "competent to testify." We think the differences in these laws are plain.[33]

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[32] That subsection contains an exception for "[c]hildren or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated."

It is also worth observing that before 1986, Rule 601(a) was codified as Tex. Code Crim. Proc. Ann., Art. 38.06 (Vernon 1979)—the section immediately preceding the law at issue in this case. (The provision then read: "All persons are competent to testify in criminal cases," and contained a similar exception for child witnesses.) We think it fair to infer that Texas was well aware of the differences in the language used in these adjacent provisions, and understood that the laws served two different functions. The dissent views Article 38.07 as an exception to the general rule of former Article 38.06. It finds it logical that the exception would be placed next to the general rule, *post*, at 564, n. 8, but does not suggest a reason why it would be logical for the supposed exception to be phrased in language so utterly different from the general rule.

Moreover, a sufficiency of the evidence rule resonates with the interests to which the *Ex Post Facto* Clause is addressed in a way that a witness competency rule does not. In particular, the elements of unfairness and injustice in subverting the presumption of innocence are directly implicated by rules lowering the quantum of evidence required to convict. Such rules will *always* run in the prosecution's favor, because they always make it easier to convict the accused. This is so even if the accused is not in fact guilty, because the coercive pressure of a more easily obtained conviction may induce a defendant to plead to a lesser crime rather than run the risk of conviction on a greater crime. Witness competency rules, to the contrary, do not necessarily run in the State's favor. A felon witness competency rule, for example, might help a defendant if a felon is able to relate credible exculpatory evidence.

Nor do such rules necessarily affect, let alone subvert, the presumption of innocence. The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained. Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of the evidence rules (by definition) do just that—they inform us whether the evidence introduced is sufficient to convict as a matter of law (which is not to say the jury *must* convict, but only that, as a matter of law, the case may be submitted to the jury and the jury may convict). In the words of Article 38.07, "[a] conviction . . . is supportable" when its requirements are met.

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[33] The dissent seems unwilling to concede this distinction. Though it admits that under Article 38.07 the uncorroborated victim is "not literally forbidden from testifying," *post,* at 563, it also insists that testimony is "inadmissible," *post,* at 571, and that "the jury will not be permitted to consider it," *post,* at 555, n. 3. See also *post,* at 557, 565 (referring to Article 38.07 as a rule about witness "credibility"); *post,* at 556, 570, 575 (referring to Texas' law as a rule of "admissibility"); *post,* at 553, 557, 563, 564, and n. 8, 575 (referring to the law as one about "competency"). We think it is clear from the text of Article 38.07 and Rule 601, however, that the victim's testimony alone is not inadmissible; it is just insufficient.

## IX

The dissent contends that Article 38.07 is not a sufficiency of the evidence rule. It begins its argument by describing at length how the corroboration requirement "is premised on a legislative judgment that accusations made by sexual assault victims above a certain age are not independently trustworthy." *Post,* at 556; see also *post,* at 557–559. But it does not follow from that premise that Article 38.07 cannot be a sufficiency of the evidence rule. Surely the legislature can address trustworthiness issues through witness competency rules and sufficiency of the evidence rules alike. Indeed, the statutory history to which the dissent points cuts against its own argument. Article 38.07's statutory antecedent, the dissent says, was a "replac[ement]" for the old common-law rule that seduced females were " 'incompetent' " as witnesses. *Post,* at 557, 558. In 1891, Texas substituted a law stating that " 'the female alleged to have been seduced *shall be permitted to testify;* but *no conviction* shall be had upon the testimony of the said female, *unless the same is corroborated . . . .*' " *Post,* at 558 (emphasis added). That statute was recodified as Article 38.07 in 1965, was repealed in 1973, and then replaced in 1975 by another version of Article 38.07. As reenacted, the law's language changed from "no conviction shall be had" to its current language that "[a] conviction . . . is supportable." We think this legislative history, to the extent it is relevant for interpreting the current law, demonstrates that Texas perceived the issue of witness trustworthiness as *both* an admissibility issue *and* as a sufficiency question; that it long ago abandoned its rule that victims of these types of crimes are incompetent as witnesses; and that Article 38.07 codifies Texas' sufficiency of the evidence solution to the trustworthiness issue.

Next, the dissent argues that under Texas' law "the prosecution need not introduce the victim's testimony at all, much less any corroboration of that testimony." *Post*, at 559. Instead, "[u]nder both the old and new versions of the statute, a conviction could be sustained on the testimony of a single third-party witness, on purely circumstantial evidence, or in any number of other ways." *Ibid.* Because other avenues of prosecution—besides the victim's testimony (with or without corroboration or outcry)—remain available to the State, Article 38.07 "did not change the quantity of proof necessary to convict *in every case*." *Post*, at 560 (emphasis added in part and deleted in part); see also *post*, at 561 ("Article 38.07 has never dictated what it takes *in all cases* . . . for evidence to be sufficient to convict" (emphasis added)). Accordingly, the dissent urges, more evidence (in the form of corroboration) is not really *required* under Article 38.07. See *post*, at 560–561, 574. It is unclear whether the dissent's argument is that laws cannot be sufficiency of the evidence rules unless they apply to *every* conviction for a particular crime, or whether the dissent means that sufficiency rules not applicable in every prosecution for a particular crime do not fall within *Calder*'s fourth category, which refers to less testimony "*required* . . . in order to convict the offender." 3 Dall., at 390 (emphasis added in part and deleted in part). Either way, the argument fails.

Fenwick's case once again provides the guide. The dissent agrees that "[t]he treason statute in effect at the time of John Fenwick's conspiracy, like the Treason Clause of our Constitution, embodied . . . a quantitative sufficiency [of the evidence] rule." *Post*, at 573. But, it argues, Fenwick's law and the Treason Clause are different from Article 38.07; with the first two laws, "two witnesses [were] *necessary* to support a conviction," *ibid.* (emphasis added), whereas with Article 38.07, the victim's testimony plus corroboration is not *"necessary* to convict *in every case," post,* at 560 (emphasis added). But a closer look at Fenwick's law and at the Treason Clause shows that this supposed distinction is simply incorrect. Fenwick's law stated that no person could be convicted of high treason "but by and upon the Oaths and Testimony of Two lawfull Witnesses . . . *unlesse the Party indicted and arraigned or tryed shall willingly without violence in open Court confesse the same or shall stand Mute or refuse to plead* . . ." See n. 15, *supra* (emphasis added). And the Treason Clause, of course, states that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, *or on Confession in open Court.*" U. S. Const., Art. III, § 3 (emphasis added). Plainly, in neither instance were two witnesses *"necessary* to support a conviction," as the dissent claims. Accordingly, its assertion that Article 38.07 "is nothing like the two-witness rule on which Fenwick vainly relied" appears erroneous, as does its accusation that our reliance on Fenwick's case "simply will not wash." *Post,* at 573.[34]

The dissent's final argument relies upon *Hopt* and runs something like this. The "effect" of Article 38.07, it claims, is the same, in certain cases, as a witness credibility rule. See *post,* at 559, 563–566, 575. However differently *Hopt-*

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[34] Perhaps one can draw a distinction between convictions based on confessions in open court and convictions based on third-party evidence and the like (though how such a distinction would comport with the language of the fourth category is not apparent). For example, an accused's confession might be thought to be outside of the State's control. But see n. 24, *supra.* It is not clear at all, though, that the availability of evidence other than the victim's testimony is any more within the State's control than is the defendant's confession.

type laws and Article 38.07 may seem to operate on their face, in practical application (at least in certain instances) their consequences are no different, and, accordingly, they ought to be treated alike. For example, if there were a rule declaring a victim to be incompetent to testify unless she was under a certain age at the time of the offense, or had made an outcry within a specified period of time, or had other corroborating evidence, and the prosecution attempted to rest its case on the victim's testimony alone without satisfying those requirements, the end result would be a judgment of acquittal. *Post*, at 564–565. Likewise, under Article 38.07, if the prosecution attempts to rest its case on the victim's testimony alone without satisfying the Article's requirements, the result would also be an acquittal. Thus, *Hopt*-type laws and Article 38.07 should be treated the same way for *ex post facto* purposes.

This argument seeks to make *Hopt* controlling by ignoring what the case says. *Hopt* specifically distinguished laws that "alter the degree, or lessen the amount or measure, of the proof" required to convict from those laws that merely respect what kind of evidence may be introduced at trial. See *supra*, at 545. The above argument, though, simply denies any meaningful distinction between those types of laws, on the premise that they produce the same results in some situations. See *post*, at 563 ("Such a victim is of course not literally forbidden from testifying, but that cannot make the difference for *Ex Post Facto* Clause purposes between a sufficiency of the evidence rule and a witness competency rule"); *post*, at 571 ("*Hopt* cannot meaningfully be distinguished from the instant case"). In short, the argument finds *Hopt* controlling by erasing the case's controlling distinction.

The argument also pays no heed to the example laid down by Fenwick's case. Surely we can imagine a witness competency rule that would operate in a manner similar to the law in that case (*e. g.*, a witness to a treasonous act is not competent to testify unless corroborated by another witness). Plainly, the imagined rule does not mean that Fenwick's case is not an example of an *ex post facto* law. But if that is so, why should it be any different for Article 38.07? Just as we can imagine a witness competency rule that would operate similarly to the statute in Fenwick's case, the above argument imagines a witness competency rule that operates similarly to Article 38.07. If the former does not change our view of the law in Fenwick's case, why should the latter change our view in the present circumstances?

Moreover, the argument fails to account for what *Calder*'s fourth category actually says, and tells only half the story of what a witness competency rule does. As for what *Calder* says, the fourth category applies to "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." 3 Dall., at 390 (emphasis deleted). The last six words are crucial. The relevant question is whether the law affects the quantum of evidence required *to convict;* a witness competency rule that (in certain instances at least) has the practical effect of telling us what evidence would result in *acquittal* does not really speak to *Calder*'s fourth category.

As for relating only half the story, the dissent's argument rests on the assertion that sometimes a witness competency rule will result in acquittals in the same instances in which Article 38.07 would also demand an acquittal. That may be conceded, but it is only half the story—and, as just noted, not the most relevant half. The other half concerns what a witness competency rule has to say about the evidence "required . . . in order to convict the offender." The answer is, nothing at all. As mentioned earlier, see *supra,* at 546–547, prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of the evidence rules, however, tell us precisely that.[35]

## X

For these reasons, we hold that petitioner's convictions on counts 7 through 10, insofar as they are not corroborated by other evidence, cannot be sustained under the *Ex Post Facto* Clause, because Texas' amendment to Article 38.07 falls within *Calder*'s fourth category. It seems worth remembering, at this point, Joseph Story's observation about the Clause:

> "'If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the

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[35] The dissent contends that the witness competency rule "would produce the same results" as a sufficiency rule, *post*, at 564–565 (emphasis deleted), and above we have been willing to assume as much for argument's sake. But the dissent's statement is not entirely correct. It would not be the witness competency rule that would produce the same result, but that rule in combination with the normally operative sufficiency rule. Failure to comply with the requirements of Article 38.07, by contrast, would mean that the evidence is insufficient to convict *by the force of that law alone.* That difference demonstrates the very distinction between witness competency rules and sufficiency of the evidence rules, points to precisely the distinction that *Hopt* drew, and illustrates why (contrary to the dissent's contention) our conclusion about Article 38.07 does not apply to "countless evidentiary rules." *Post*, at 571.

That is also why the dissent's statement that we have been "misdirected" by the plain text of Article 38.07 is wrong. *Post*, at 564. The dissent asserts that "any evidence" admitted under an applicable rule of evidence could "potentially" support a conviction, *ibid.*, and therefore Article 38.07's explicit specification that a conviction "is supportable" if its requirements are met does not distinguish it from ordinary rules of evidence. Once again, we point out that whether certain evidence can support a conviction is *not* determined by the rule of admissibility itself, but by some other, separate, normally operative sufficiency of the evidence rule. The distinction the dissent finds illusive is that Article 38.07 *itself* determines the evidence's sufficiency (that is why it is a sufficiency of the evidence rule), while witness competency rules and other ordinary rules of evidence do not (because they are admissibility rules, not sufficiency rules). See also n. 23, *supra.*

> defect of the laws, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend.'" 3 Commentaries on the Constitution § 1338, at 211, n. 2.

And, of course, nothing in the *Ex Post Facto* Clause prohibits Texas' *prospective* application of its amendment. Accordingly, the judgment of the Texas Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

The Court today holds that the amended version of Article 38.07 of the Texas Code of Criminal Procedure reduces the amount of proof necessary to support a sexual assault conviction, and that its retroactive application therefore violates the *Ex Post Facto* Clause. In so holding, the Court misreads both the Texas statute and our precedents concerning the *Ex Post Facto* Clause. Article 38.07 is not, as the Court would have it, most accurately characterized as a "sufficiency of the evidence rule"; it is in its essence an evidentiary provision dictating the circumstances under which the jury may credit victim testimony in sexual offense prosecutions. The amended version of Article 38.07 does nothing more than accord to certain victims of sexual offenses full testimonial stature, giving them the same undiminished competency to testify that Texas extends to witnesses generally in the State's judicial proceedings. Our precedents make clear that such a witness competency rule validly may be applied to offenses committed before its enactment. I therefore dissent.

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Petitioner Scott Leslie Carmell began sexually abusing his stepdaughter, "K. M.," in the spring of 1991, when K. M. was 13 years old. He continued to do so through March 1995. The specific question before the Court concerns Carmell's sexual assault on K. M. in June 1992, when K. M. was 14.[1] K. M. did not inform anyone about that assault or about any of Carmell's other sexual advances toward her until sometime around March 1995, when she told a friend and then her mother, Eleanor Alexander. Alexander went to the police, and Carmell was arrested and charged in a 15-count indictment.

Under Article 38.07 of the Texas Code of Criminal Procedure as it stood at the time of the assault, a conviction for sexual assault was supportable on the uncorroborated testimony of the victim if the victim was younger than 14 years old at the time of the offense. If the victim was 14 years old or older, however, the victim's testimony could support a conviction only if that testimony was corroborated by other evidence. One form of corroboration, specifically described in Article 38.07 itself, was known as "outcry": The victim's testimony could support a conviction if he or she had informed another person, other than the defendant, about the offense within six months of its occurrence. Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon 1983).

Article 38.07 was amended in 1993. Under the new version, which was in effect at the time of Carmell's trial, the victim's uncorroborated testimony can support a conviction as long as the victim was under 18 years of age at the time of the offense. Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon Supp. 2000). The corroboration requirement continues in force for victims aged 18 or older, with a modified definition of outcry not material here. Thus, under the version of Article 38.07 in effect at the time of Carmell's trial but not the version in effect at the time of the offense, his conviction was supportable by the uncorroborated testimony of K. M. The new version of Article 38.07 was applied at Carmell's trial, and he was convicted.[2] Carmell argues that the application of the new version of Article 38.07 to his trial violated the *Ex Post Facto* Clause, U. S. Const., Art. I, § 10, cl. 1.

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[1] The Court correctly notes that Carmell's *ex post facto* challenge applies equally to three other counts on which he was convicted. *Ante,* at 518–519. This Court's grant of review, however, was limited to the first question presented in Carmell's petition for certiorari, which encompassed only the count charging the June 1992 assault. Pet. for Cert. 4.

## I

A proper understanding of Article 38.07 of the Texas Code of Criminal Procedure is central to this case. Accordingly, I turn first to the effect and purpose of that statute.

The effect of Article 38.07 in sexual offense prosecutions is plain. If the victim is of a certain age, the jury, in assessing whether the prosecution has met its burden of demonstrating guilt beyond a reasonable doubt, must give no weight to her testimony unless that testimony is corroborated, either by other evidence going directly to guilt or by "outcry."[3] For victims (such as K. M.) who were between the ages of 14 and

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[2] The Texas Court of Appeals did not rule on whether the State in fact did corroborate K. M.'s testimony at trial. I note the testimony of K. M.'s mother that when she visited Carmell in jail and told him he needed to confess if he was sorry for what he had done, he wrote "'adultery with [K. M.]'" on a piece of paper. 963 S. W. 2d 833, 835 (Tex. App. 1998). That testimony might count as corroboration. Because this question is outside the grant of certiorari, I (like the Court, see *ante*, at 519, n. 4) do not further address it.

[3] At first glance one might object that the statute permits the jury to give such testimony *some* weight, just not enough to support a conviction. See, *e. g., ante*, at 546, n. 33 (contending that under the old Article 38.07, "the victim's testimony alone is not inadmissible, it is just insufficient"). A moment's reflection should reveal, however, that this distinction is illusory. If a particular item of evidence cannot by itself support a conviction, then the jury will not be permitted to consider it unless and until corroborating evidence is introduced.

18 at the time of the offense, the 1993 amendment repealed this corroboration requirement. The amended version of Article 38.07 thus permits sexual assault victims between 14 and 18 to have their testimony considered by the jury in the same manner and with the same effect as that of witnesses generally in Texas prosecutions.

This sort of corroboration requirement—still embodied in Article 38.07 for victims aged 18 or older—is a common, if increasingly outmoded, rule of evidence. Its purpose is to rein in the admissibility of testimony the legislature has deemed insufficiently credible standing alone. Texas' requirement of corroboration or outcry, like similar provisions in other jurisdictions, is premised on a legislative judgment that accusations made by sexual assault victims above a certain age are not independently trustworthy. See *Villareal* v. *State*, 511 S. W. 2d 500, 502 (Tex. Crim. App. 1974) ("The basis of this rule is that the failure to make an outcry or promptly report the rape diminishes the credibility of the prosecutrix."); cf., *e. g.*, *Battle* v. *United States*, 630 A. 2d 211, 217 (D. C. 1993) (evidence of outcry "rebuts an implied charge of recent fabrication, which springs from some jurors' assumptions that sexual offense victims are generally lying and that the victim's failure to report the crime promptly is inconsistent with the victim's current statement that the assault occurred").

Legislatures in many States, including Texas, have enacted similar evidentiary provisions requiring corroboration for the testimony of other categories of witnesses, particularly accomplices. See, *e. g.*, Tex. Code Crim. Proc. Ann., Art. 38.14 (Vernon Supp. 2000) ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed . . . ."). Such provisions—generally on the wane but still in force in several States—are, like Article 38.07, designed to ensure the credibility of the relevant witness. See, *e. g.*, *State* v. *Haugen*, 448 N. W. 2d 191, 194

(N. D. 1989) ("The purpose of corroborating evidence is to show that accomplices are reliable witnesses and worthy of credit."); *Holladay* v. *State*, 709 S. W. 2d 194, 196 (Tex. Crim. App. 1986) ("Because such a witness [*i. e.*, an accomplice] is usually deemed to be corrupt, his testimony is always looked upon with suspicion."); *Fleming* v. *State*, 760 P. 2d 208, 209–210 (Okla. Crim. App. 1988) ("The purpose behind the requirement of corroboration is to protect an accused from being falsely implicated by another criminal in the hope of clemency, a desire for revenge, or for any other reason.").

I make no judgment here as to the propriety of the Texas Legislature's decision to view the testimony of certain sexual assault victims in the same light as that of accomplices. *Ex post facto* analysis does not depend on an assessment of a statute's wisdom. For current purposes it suffices to note that Article 38.07's corroboration requirement rests on the same rationale that underpins accomplice corroboration requirements: the notion that a particular witness, because of his or her role in the events at issue, might not give trustworthy testimony. See *Reed* v. *State*, 991 S. W. 2d 354, 361 (Tex. App. 1999) ("Generally speaking, the need to corroborate the testimony of a sexual assault victim stems from the notion that the victim, if over the age of consent, could be an accomplice rather than a victim."); *Hernandez* v. *State*, 651 S. W. 2d 746, 751 (Tex. Crim. App. 1983) (concurring opinion adopted on rehearing) (Article 38.07's corroboration requirement "was meant to deal *only* with testimony of a victim of a sexual offense who, for one reason or another, was held to be an 'accomplice witness' and, perforce, whose testimony must be corroborated.").

The history of Article 38.07 bears out the view that its focus has always been on the competency and credibility of the victim as witness. The origins of the statute could be traced to the fact that in Texas, "for many years a seduced female was an incompetent witness as a matter of law." *Holladay*, 709 S. W. 2d, at 200. See, *e. g.*, *Cole* v. *State*, 40

Tex. 147 (1874); see also *Hernandez,* 651 S. W. 2d, at 751–752 (tracing the current Article 38.07 to the earlier seduction victim competency rule). In 1891, this common-law disability was lifted by statute and replaced by a corroboration requirement: "In prosecutions for seduction . . . the female alleged to have been seduced shall be permitted to testify; but no conviction shall be had upon the testimony of the said female, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged." Tex. Rev. Crim. Stat., Tit. 8, ch. 7, Art. 789 (1911). The application of this statute to offenses committed before its enactment was upheld by the Texas courts on the authority of *Hopt* v. *Territory of Utah,* 110 U. S. 574 (1884). See *Mrous* v. *State,* 31 Tex. Crim. App. 597, 21 S. W. 764 (1893). The corroboration requirement for seduction prosecutions, recodified in 1965 at Tex. Code Crim. Proc. Ann., Art. 38.07, remained in effect until 1973, when the entire 1925 Penal Code (including the offense of seduction) was repealed.

In 1975, Article 38.07 was enacted substantially in its present form. As revised, the article covered all sexual offenses in Chapter 21 of the Texas Penal Code; however, it contained no express exemption from the corroboration requirement for the testimony of the youngest victims. Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon 1979). The exemption for victims under the age of 14 was added in 1983, and extended in 1993 to cover those under the age of 18, as already described. As initially proposed, the 1993 change would have eliminated the corroboration/outcry requirement altogether. House Research Organization, Texas House of Representatives, Daily Floor Report 13 (Mar. 15, 1993), Lodging of Petitioner. Supporters of the proposal maintained that "[v]ictims in sexual assault cases are no more likely to fantasize or misconstrue the truth than the victims of most other crimes, which do not require corroboration of testimony or previous 'outcry.' Juries can decide if a witness is credible. . . . Most states no longer require this type of corroboration; neither should Texas." *Id.*, at 14. The historical development of Article 38.07 reveals a progressive alleviation of restrictions on the competency of victim testimony, not a legislative emphasis on the quantum of evidence needed to convict.

The version of Article 38.07 applied at Carmell's trial was thus, in both effect and purpose, an evidentiary rule governing the weight that may be given to the testimony of sexual assault victims who had attained the age of 14. The Court's efforts to paint it as something more than that are detached from the statute's moorings and are consequently unpersuasive.

To begin with, it is beyond doubt that Article 38.07 does not establish an element of the offense. See *Love* v. *State*, 499 S. W. 2d 108, 108 (Tex. Crim. App. 1973) ("[O]utcry is not one of the elements of the offense charged."). To convict a defendant of sexual assault in Texas today as before 1993, the prosecution need not introduce the victim's testimony at all, much less any corroboration of that testimony. The Court is therefore less than correct in asserting that "[u]nder the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony *and* corroborative evidence." *Ante*, at 530. Under both the old and new versions of the statute, a conviction could be sustained on the testimony of a single third-party witness, on purely circumstantial evidence, or in any number of other ways—so long as the admissible evidence presented is sufficient to prove all of the elements of the offense beyond a reasonable doubt.[4] And under either version of Article 38.07, of course, the accused could be convicted, like any other defendant, on the basis of a guilty plea or a voluntary confession. Article 38.07, in other words, does not define "sexual assault proven by corroborated victim testimony" as a distinct offense from "sexual assault." Rather, the measure operates only to restrict the State's method of proving its case.[5]

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[4] Not only is corroborated victim testimony not *necessary* for a conviction under the former version of Article 38.07, it is not always *sufficient*. Under both the old and new versions of the statute, the prosecution's evidence will not support a conviction unless it is adequate to prove all the elements of the offense beyond a reasonable doubt.

And it does so without affecting in any way the burden of persuasion that the prosecution must satisfy to support a conviction. Under both the old and new versions of the statute, the applicable standard is proof beyond a reasonable doubt. The amendment in 1993 that repealed the corroboration requirement for victims between the ages of 14 and 18 did nothing to change that standard.

The Court recognizes that Article 38.07 does not affect the applicable burden of persuasion, see *ante*, at 539, but several times it asserts that the amended version of the statute "changed the *quantum* of evidence *necessary* to sustain a conviction," *ante*, at 530 (emphasis added). See also *ante*, at 531 (amended law "permitted petitioner to be convicted with less than the previously *required quantum* of evidence"); *ante*, at 532–533 (amended law "[r]educ[es] the *quantum* of evidence *necessary* to meet the burden of proof" (emphases added)). If by the word "quantum" the Court means to refer to the burden of persuasion, these statements are simply incorrect and contradict the Court's own acknowledgment. And if, as appears more likely, "quantum" refers to some required *quantity* or *amount* of proof, the Court is also wrong. The partial repeal of Article 38.07's corroboration requirement did not change the *quantity* of proof necessary to convict in every case, for the simple reason that Texas has never required the prosecution to introduce any particular number of witnesses or items of proof to support a sexual assault conviction.[6]

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[5] By the same reasoning, the repeal of the corroboration requirement for victims between the ages of 14 and 18 plainly did not deprive sexual assault defendants of any defense they previously enjoyed.

The Court also declares several times that the amended version of Article 38.07 "subverts the presumption of innocence." See *ante*, at 532; see also *ante*, at 533, nn. 22, 23, 546. The phrase comes from *Cummings* v. *Missouri*, 4 Wall. 277 (1867), in which the Court struck down a series of post-Civil War amendments to the Missouri Constitution that imposed penalties on persons unable or unwilling to swear an oath that they had not aided the Confederacy. The amendments, the Court said in *Cummings*, "subvert the presumptions of innocence" because "[t]hey assume that the parties are guilty [and] . . . call upon [them] to establish their innocence" by swearing the oath. *Id.*, at 328. Nothing of the kind is involved here. Article 38.07 did not impose a presumption of guilt on Carmell and then saddle him with the task of overcoming it. The burden of persuasion remained at all times with the State. See Tex. Code Crim. Proc. Ann., Art. 38.03 (Vernon Supp. 2000). Carmell's presumption of innocence is thus untouched by the current Article 38.07's recognition of K. M.'s full testimonial stature.

The Court places perhaps its greatest weight on the "sufficiency of the evidence" label, see *ante*, at 547–552, but the label will not stick. As just noted, Article 38.07 has never dictated what it takes in all cases, quantitatively or qualitatively, for evidence to be sufficient to convict. To the contrary, under both the old and new versions of the statute the prosecution's admissible evidence will be sufficient to support a conviction if a rational factfinder presented with that evidence could find the defendant guilty beyond a reasonable doubt. The 1993 repeal of the corroboration requirement for victims between the ages of 14 and 18 did not lower that "sufficiency of the evidence" hurdle; it simply expanded the range of methods the State could use to surmount it.

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[6] Moreover, even in a case founded on the victim's testimony, the pre-1993 version of Article 38.07 would permit the prosecution to corroborate that testimony without introducing any additional evidence going to the defendant's guilt, because corroboration could be provided by outcry, which is hearsay and inadmissible to prove the truth of the matter asserted. See *Heckathorne* v. *State*, 697 S. W. 2d 8, 12 (Tex. App. 1985) ("[A]n outcry should not be admitted for its truth, but merely as evidence that the victim informed someone of the offense.").

To be sure, one might descriptively say in an individual case that the uncorroborated testimony of the victim would be "sufficient" to convict under the new version of Article 38.07 and "insufficient" under the old. But that cannot be enough to invalidate a statute as *ex post facto.* If it were, then all evidentiary rules that work to the defendant's detriment would be unconstitutional as applied to offenses committed before their enactment—an outcome our cases decisively reject. See *infra,* at 570–571 (discussing *Thompson* v. *Missouri,* 171 U. S. 380 (1898), and *Hopt* v. *Territory of Utah,* 110 U. S. 574 (1884), which upheld the retroactive application of evidentiary rules governing the authentication of documents and the competency of felons to testify, respectively). A defendant whose conviction turned, for example, on an item of hearsay evidence considered inadmissible at the time of the offense but made admissible by a later enacted statute might accurately describe the new statute as one that permits conviction on less evidence than was "sufficient" under prior law. But our precedents establish that such a defendant has no valid *ex post facto* claim. See *infra,* at 570–571. Neither does Carmell.

The Court attempts to distinguish Article 38.07 from garden-variety evidentiary rules by asserting that the latter "are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case." *Ante,* at 533, n. 23. The truth of this assertion is not at all clear. Evidence is never admissible in its own right; it must be admitted for some purpose. Rules of admissibility typically take that basic fact into account, often restricting the use of evidence in a way that systematically disadvantages one side. Consider, for example, a rule providing that evidence of a rape victim's sexual relations with persons other than the accused is admissible to prove consent, or a rule providing that evidence of a sexual assault defendant's prior sexual offenses is inadmissible to show a propensity to commit that type of crime. A statute repealing either of the above rules would "*always* run in the prosecution's favor . . . [by] mak[ing] it easier to convict the accused." *Ante,* at 546.[7] Yet no one (until today) has suggested that such a statute would be *ex post facto* as applied to offenses committed before its enactment.

The Court resists the conclusion that Article 38.07 functions as a rule of witness competency by asserting that "[b]oth before and after the amendment, the victim's testimony was competent evidence." *Ante,* at 544. In all but the most technical sense that blanket statement is dubious. If the victim was 14 years old or older at the time of the offense (18 or older under the amended statute) and her testimony is unbolstered by corroboration or outcry, the jury may not credit that testimony in determining whether the State has met its burden of proof. Such a victim is of course not literally forbidden from testifying, but that cannot make the difference for *Ex Post Facto* Clause purposes between a sufficiency of the evidence rule and a witness competency rule. Evidence to which the jury is not permitted to assign weight is, in reality, incompetent evidence.

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[7] Cf. Fed. Rules Evid. 412(a)(1) (restricting admissibility of "[e]vidence offered to prove that any alleged victim [of sexual misconduct] engaged in other sexual behavior"); 412(b)(1)(B) (providing that "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused" is admissible to prove consent); 413(a) (providing that "evidence of the defendant's commission of another offense or offenses of sexual assault is admissible" in sexual assault cases notwithstanding Rule 404(b)'s general prohibition on the introduction of prior bad acts evidence "to show action in conformity therewith").

Perhaps the Court has been misdirected by the wording of Article 38.07, which speaks in both its old and new versions of evidence upon which a "conviction . . . is supportable." See *ante,* at 547. That sounds like a "sufficiency of the evidence rule," until one realizes that any evidence admissible in a criminal case—*i. e.,* any evidence that a jury is entitled to consider in determining whether the prosecution has met its burden of persuasion—is at least potentially evidence upon which a "conviction . . . is supportable." Conversely, as I have just said, evidence to which the jury may give no weight in making that determination is effectively inadmissible.[8]

In short, no matter how it is phrased, the corroboration requirement of Article 38.07 is functionally identical to a conditional rule of witness competency. If the former version of Article 38.07 had provided instead that "the testimony of the victim shall be inadmissible to prove the defendant's guilt unless corroborated," *it would produce the*

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[8] It is thus no wonder that before 1986 the general rule of witness competency was codified at Article 38.06 of the Texas Code of Criminal Procedure, and the statute now at issue immediately followed it. Article 38.07 was an exception to the general rule laid out in Article 38.06. It is logical to put an exception right after the rule. Yet the Court draws the opposite inference from that juxtaposition. See *ante,* at 545, n. 32.

The Court's related observation that Texas' general witness competency statute "already contains its own provision respecting child witnesses," *ante,* at 544–545, is true but irrelevant. Article 38.07's corroboration requirement has nothing to do with the diminished credibility of child witnesses. Indeed, the statute has always permitted juries to credit fully the testimony of sexual offense victims *below* a certain age (first 14, then 18) without any corroboration, the reason apparently being that the legislature considers victims under a certain age to be too young to consent to sex and then lie about it. See, *e. g., Scoggan* v. *State,* 799 S. W. 2d 679, 681 (Tex. Crim. App. 1990); *Hernandez* v. *State,* 651 S. W. 2d 746, 752–753 (Tex. Crim. App. 1983) (concurring opinion adopted on rehearing). The corroboration requirement attaches only to victims *above* a certain age, and thus would not be appropriate for inclusion in a "provision respecting child witnesses."

*same results as the actual statute in every case.* Not "in certain instances," *ante,* at 551, or "in some situations," *ante,* at 550, but in every case.[9] Recognizing this equivalency, the Texas Court of Criminal Appeals has noted that the Texas accomplice corroboration rule is "a mere rule of evidence" even though "*statutorily* worded as a sufficiency standard." *Malik* v. *State,* 953 S. W. 2d 234, 240, n. 6 (1997).[10]

In sum, the function and purpose of the corroboration requirement embedded in the former version of Article 38.07 was to ensure the credibility of the victim's testimony, not otherwise to impede the defendant's conviction. Our precedents, I explain next, make clear that the retroactive repeal of such an evidentiary rule does not violate the *Ex Post Facto* Clause.

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[9] The Court contends that the effect of Article 38.07 is distinct from that of a witness competency rule because noncompliance with the former dictates acquittal *ex proprio vigore* while noncompliance with the latter dictates acquittal "in combination with the normally operative sufficiency rule." *Ante,* at 552, n. 35. This is a distinction without a difference, because the "normally operative sufficiency rule" in question—when the prosecution submits no admissible evidence, its case will be deemed insufficient—is a bedrock requirement of due process, applicable in every criminal trial.

[10] The Court observes that the characterization of a state law under the *Ex Post Facto* Clause is a federal question. *Ante,* at 544, n. 31. This undoubtedly correct observation stands in some tension, however, with the Court's reliance on the assertion that "Texas courts treat Article 38.07 as a sufficiency of the evidence rule." *Ante,* at 518, n. 2. In any event, the latter assertion is inaccurate, as *Malik*'s discussion of the accomplice corroboration rule suggests. It is true that a trial court's failure to comply with Article 38.07 results on appeal in the entry of an order of acquittal. But it is not true that the remedy on appeal for the introduction of inadmissible evidence is always a remand for a new trial. When the only evidence introduced by the prosecution is evidence that may not be considered by a jury in determining the defendant's guilt, the proper result is always acquittal. By the same reasoning, as this Court decided just this Term, when a court of appeals has found that evidence was improperly admitted in a civil trial and that the remaining evidence is insufficient, it may enter judgment as a matter of law rather than ordering a new trial. *Weisgram* v. *Marley Co.,* 528 U. S. 440 (2000).

## II

The *Ex Post Facto* Clause, this Court has said repeatedly, furthers two important purposes. First, it serves "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U. S. 24, 28–29 (1981).[11] Second, it "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.*, at 29; see also *Landgraf* v. *USI Film Products*, 511 U. S. 244, 267 (1994); *Miller* v. *Florida*, 482 U. S. 423, 429–430 (1987). The latter purpose has much to do with the separation of powers; like its textual and conceptual neighbor the Bill of Attainder Clause, the *Ex Post Facto* Clause aims to ensure that legislatures do not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases. *Weaver*, 450 U. S., at 29, n. 10.

The Court does not even attempt to justify its extension of the Clause in terms of these two fundamental purposes. That is understandable, for today's decision serves neither purpose. The first purpose (fair warning and reliance), vital as it is, cannot tenably be relied upon by Carmell. He had ample notice that the conduct in which he engaged was illegal. He certainly cannot claim to have relied in any way on the preamendment version of Article 38.07: He tendered no reason to anticipate that K. M. would not report the assault within the outcry period, nor any cause to expect that corroborating evidence would not turn up sooner or later. Nor is the Clause's second purpose relevant here, for there is no indication that the Texas Legislature intended to single out this defendant or any class of defendants for vindictive or arbitrary treatment. Instead, the amendment of Article 38.07 simply brought the rules governing certain victim testimony in sexual offense prosecutions into conformity with Texas law governing witness testimony generally.

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[11] Today's opinion apart, see *ante*, at 531, n. 21, this Court has consistently stressed " 'lack of fair notice' " as one of the "central concerns of the *Ex Post Facto* Clause." *Lynce* v. *Mathis*, 519 U. S. 433, 441 (1997) (quoting *Weaver* v. *Graham*, 450 U. S. 24, 30 (1981)). See also *Landgraf* v. *USI Film Products*, 511 U. S. 244, 266–267 (1994); *Miller* v. *Florida*, 482 U. S. 423, 430 (1987); *Weaver*, 450 U. S., at 28–29; *Marks* v. *United States*, 430 U. S. 188, 191–192 (1977). The implausibility of *ex ante* reliance on rules of admissibility like the one at issue here helps explain why the *Ex Post Facto* Clause has never been held to apply to changes in such rules.

In holding the new Article 38.07 unconstitutional as applied to Carmell, the Court relies heavily on the fourth category of *ex post facto* statutes enumerated by Justice Chase in his opinion in *Calder* v. *Bull,* 3 Dall. 386, 390 (1798): "Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*" Justice Chase's formulation was dictum, of course, because *Calder* involved a civil statute and the Court held that the statute was not *ex post facto* for that reason alone. Moreover, Justices Paterson and Iredell in their own *seriatim* opinions gave no hint that they considered rules of evidence to fall within the scope of the Clause. See *id.,* at 395–397 (Paterson, J.); *id.,* at 398–400 (Iredell, J.). Still, this Court has come to view Justice Chase's categorical enumeration as an authoritative gloss on the *Ex Post Facto* Clause's reach. Just a decade ago in *Collins* v. *Youngblood,* 497 U. S. 37 (1990), for instance, this Court reiterated that "the prohibition which may not be evaded is the one defined by the *Calder* categories." *Id.,* at 46.

If those words are placed in the context of the full text of the *Collins* opinion, however, a strong case can be made that *Collins* pared the number of *Calder* categories down to three, eliminating altogether the fourth category on which the Court today so heavily relies. As long ago as 1925, in *Beazell* v. *Ohio,* 269 U. S. 167, the Court cataloged *ex post* *facto* laws without mentioning Chase's fourth category at all. *Id.*, at 169–170. And in *Collins* the Court cited with apparent approval *Beazell's* omission of the fourth category, 497 U. S., at 43, n. 3, declaring that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Id.*, at 43. *Collins* concluded by reciting in the plainest terms the prohibitions laid down by the *Ex Post Facto* Clause: A statute may not "punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Id.*, at 52. This recitation conforms to *Calder's* first three categories, but not the fourth; changes in evidentiary rules are nowhere mentioned.[12]

The majority asserts that the Court has repeatedly endorsed Justice Chase's formulation, "including, in particular, the fourth category," and it offers an impressive-looking string citation in support of the claim. *Ante*, at 525. Yet all of those cases simply quoted or paraphrased Chase's enumeration, a mechanical task that naturally entailed a recitation of the fourth category. Not one of them depended on that category for the judgment the Court reached.[13] Neither did Justice Washington's opinion in *Ogden* v. *Saunders*, 12 Wheat. 213 (1827), which is quoted extensively by the Court, *ante*, at 532. In fact, the Court has never until today relied on the fourth *Calder* category to invalidate the application of a statute under the *Ex Post Facto* Clause.

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[12] In *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 504–505 (1995), the Court similarly enumerated the categories of *ex post facto* laws without mentioning the fourth category.

[13] The Court in *Cummings* v. *Missouri*, 4 Wall. 277 (1867), invoked the fourth category, see *id.*, at 328, but that invocation was hardly necessary to the Court's holding. In *Cummings*, as already noted, the Court invalidated on Bill of Attainder Clause and *Ex Post Facto* Clause grounds state constitutional amendments that imposed punishment on persons unable to swear an oath that they had not taken up arms against the Union in the Civil War. The Court recognized that the challenged amendments, though framed in terms of a method of proof, were "aimed at past acts,

It is true that the Court has on two occasions struck down as *ex post facto* the retroactive application of rules governing the functioning of the criminal trial process—but both decisions have since been overruled. In *Kring* v. *Missouri*, 107 U. S. 221 (1883), the Court held that Missouri was forbidden to apply retroactively a state constitutional amendment providing that a plea of guilty to second-degree murder would not automatically serve on retrial as an acquittal of the charge of first-degree murder. And in *Thompson* v. *Utah*, 170 U. S. 343 (1898), the Court held that a change in state law reducing the number of petit jurors in criminal trials from 12 to 8 was *ex post facto* because it deprived the defendant of "a substantial right involved in his liberty." *Id.*, at 352. The Court in *Collins* overruled both *Kring* and *Thompson* v. *Utah*, concluding that neither decision was "consistent with the understanding of the term '*ex post facto* law' at the time the Constitution was adopted." *Collins*, 497 U. S., at 47, 50, 51–52.

The Court today offers a different reading of *Collins*. It concludes that *Collins* overruled *Kring* and *Thompson* v. *Utah* because those cases improperly construed the *Ex Post Facto* Clause to cover all "substantial protections," and that the fourth *Calder* category consequently remains intact.

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and not future acts," *id.*, at 327, for only those who had aided the Confederacy would be unable to take the expurgatory oath. The Court held that the amendments violated *Calder*'s first category by retroactively creating new offenses, 4 Wall., at 327–328, and violated the third category by retroactively imposing new punishments, *id.*, at 328. As for *Calder*'s fourth category, the Court said only that the amendments "subvert[ed] the presumptions of innocence" by "assum[ing] that the parties [we]re guilty." 4 Wall., at 328. As already discussed, *supra*, at 561, that analysis is of no help to Carmell here.

That is a plausible reading of *Collins*, and I might well be prepared to accept it, were the issue presented here. But it is not. For purposes of this case, it does not matter whether *Collins* eliminated the fourth *Calder* category or left it undisturbed. For even if the fourth category remains viable, our precedents make clear that it cannot be stretched to fit the statutory change at issue here. Those precedents—decisions that fully acknowledged the fourth *Calder* category—firmly establish that retroactively applied changes in rules concerning the admissibility of evidence and the competency of witnesses do not raise *Ex Post Facto* Clause concerns.

In *Thompson* v. *Missouri*, 171 U. S. 380 (1898), this Court upheld against *ex post facto* attack the retroactive application of a statute that permitted the introduction of previously inadmissible evidence to demonstrate the authenticity of disputed writings. The new statute, the Court reasoned, "did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused." *Id.*, at 387.

The case most similar to the one before us is *Hopt* v. *Territory of Utah*, 110 U. S. 574 (1884). In that case, a statute in effect at the time of the offense but repealed by the time of trial provided that felons were incompetent to testify. The defendant, whose conviction for capital murder had been based in large part on the testimony of a felon, claimed that the application of the new law to his trial was *ex post facto*. The Court rejected the defendant's claim, adopting reasoning applicable to the instant case:

> "Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do

> not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." *Id.*, at 589.

As the quoted passage shows, the Court in *Hopt* rejected the defendant's *Ex Post Facto* Clause claim while retaining *Calder*'s fourth category. The same outcome should obtain today, for *Hopt* cannot meaningfully be distinguished from the instant case.

The Court asserts that "Article 38.07 plainly fits" the fourth *Calder* category, because "[r]equiring only the victim's testimony to convict, rather than the victim's testimony plus other corroborating evidence is surely 'less testimony required to convict' in any straightforward sense of those words." *Ante*, at 530. Yet to declare Article 38.07 *ex post facto* on that basis is to overrule *Hopt* without saying so. For if the amended version of Article 38.07 requires "less testimony . . . to convict," then so do countless evidentiary rules, including the felon competency rule whose retroactive application we upheld in *Hopt*. In both this case and *Hopt*, a conviction based on evidence previously deemed inadmissible was sustained pursuant to a broadened rule regarding the competency of testimonial evidence. The mere fact that the new version of Article 38.07 makes some convictions easier to obtain cannot be enough to preclude its retroactive application. "Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*." *Dobbert* v. *Florida*, 432 U. S. 282, 293 (1977).

In short, the Court's expansive new reading of the *Ex Post Facto* Clause cannot be squared with this Court's prior decisions. Rather than embrace such an unprecedented approach, I would advance a "commonsense understanding of

*Calder*'s fourth category," *ante*, at 530, one that comports with our precedents and with the underlying purposes of the *Ex Post Facto* Clause: Laws that reduce the burden of persuasion the prosecution must satisfy to win a conviction may not be applied to offenses committed before their enactment. To be sure, this reading would leave the fourth category with considerably less independent effect than it would have had in Justice Chase's day, given our intervening decisions establishing the "beyond a reasonable doubt" standard as a constitutional minimum under the Due Process Clause. See, *e. g., In re Winship*, 397 U. S. 358 (1970); *Jackson* v. *Virginia*, 443 U. S. 307 (1979). But it is not a reading that necessarily renders the category meaningless even today. Imagine, for example, a statute requiring the prosecution to prove a particular sentencing enhancement factor—leadership role in the offense, say, or obstruction of justice—beyond a reasonable doubt. A new statute providing that the factor could be established by a mere preponderance of the evidence might rank as *ex post facto* if applied to offenses committed before its enactment. The same might be said of a statute retroactively increasing the defendant's burden of persuasion as to an affirmative defense.

Burdens of persuasion are *qualitative* tests of sufficiency. *Calder*'s fourth category, however, encompasses *quantitative* sufficiency rules as well, for Justice Chase did speak of a law that "receives *less* . . . testimony, than the law *required* at the time of the commission of the offence." 3 Dall., at 390 (emphasis added). Cf. *Hopt*, 110 U. S., at 590 ("Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in *amount* or degree, than was *required* when the offence was committed" might be *ex post facto*. (emphasis added)). Quantitative sufficiency rules are rare in modern Anglo-American law, but some do exist. Criminal statutes sometimes limit the prosecution to a particular form of proof, for example, the testimony of two witnesses to the same overt act. In modern Anglo-

American law, such instances have been almost exclusively confined to two contexts: perjury, see *Weiler* v. *United States*, 323 U. S. 606 (1945), and treason, see U. S. Const., Art. III, §3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."). See generally Wigmore, Required Numbers of Witnesses; A Brief History of the Numerical System in England, 15 Harv. L. Rev. 83, 100–108 (1901).

The treason statute in effect at the time of John Fenwick's conspiracy, like the Treason Clause of our Constitution, embodied just such a quantitative sufficiency rule: As long as the accused traitor put the prosecution to its proof by pleading not guilty, the sworn testimony of two witnesses was necessary to support a conviction. The Court describes at great length the attainder of Fenwick, which served as a cautionary model for Justice Chase's explication of the fourth category in *Calder*. See *ante*, at 526–530.[14] This excursion into post-Restoration English history is diverting, but the Court's statement that "the circumstances of petitioner's case parallel those of Fenwick's case 300 years earlier," *ante*, at 530, simply will not wash. The preamendment version of Article 38.07 is nothing like the two-witness rule on which Fenwick vainly relied.[15]

First, the preamendment version of Article 38.07, unlike a two-witness rule, did not apply indifferently to all who testify. Rather, it branded a particular class of witnesses—

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[14] Tellingly, the Court offers no evidence that anyone at the time of the Framers considered witness corroboration requirements of the type involved here to fall within the scope of the *ex post facto* prohibition.

[15] When the Texas Legislature wants to enact a two-witness rule, it knows how to do so. See Tex. Code Crim. Proc. Ann., Art. 38.15 (Vernon Supp. 2000) ("No person can be convicted of treason except upon the testimony of at least two witnesses to the same overt act, or upon his own confession in open court."); Art. 38.18(a) ("No person may be convicted of perjury or aggravated perjury if proof that his statement is false rests solely upon the testimony of one witness other than the defendant.").

sexual assault victims aged 14 or older—as less competent than others to speak in court. Second, as I have already described, the Texas statute did not restrict the State to one prescribed form of proof. Both before and after the 1993 amendment, introduction of the victim's corroborated testimony was neither required nor necessarily sufficient to sustain a conviction. Prosecutors' compliance with both the old and new versions of Article 38.07 thus "says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender." *Ante*, at 547, 551–552.[16] On the contrary, the only sufficiency rule applicable in Texas sexual offense prosecutions has always been a qualitative one: The State's evidence must be sufficient to prove every element of the offense beyond a reasonable doubt.

That should not be surprising. It makes little sense in our modern legal system to conceive of standards of proof in quantitative terms. In a civil case, the winner is the party that produces *better* evidence, not the party that produces *more* evidence. Similarly, in a criminal trial the prosecution need not introduce any fixed amount of evidence, so long as the evidence it does introduce could persuade a rational factfinder beyond a reasonable doubt. "Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy. In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures on which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity." *Weiler*, 323 U. S., at 608. If the Court wishes to rely on the fourth *Calder* category to render Texas' altered evidentiary rule prospective only, it should do so forthrightly by overruling *Hopt* and *Thompson* v. *Missouri*, rather than by attempting to portray Article 38.07 as a quantitative sufficiency rule indistinguishable from the two-witness requirement that figured in John Fenwick's case.

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[16] *Noncompliance* with the former version of Article 38.07 does say something: The statute mandates acquittal if the prosecution comes forward with no evidence beyond the victim's testimony, which is deemed unreliable standing alone. But as the Court itself recognizes, "a witness competency rule that . . . has the practical effect of telling us what evidence would result in *acquittal* does not really speak to *Calder*'s fourth category." *Ante*, at 551.

* * *

In sum, it is well settled (or was until today) that retroactive changes to rules concerning the admissibility of evidence and the competency of witnesses to testify cannot be *ex post facto*. Because Article 38.07 is in both function and purpose a rule of admissibility, *Thompson* v. *Missouri*, *Hopt*, *Beazell*, and *Collins* dictate that its retroactive application does not violate the *Ex Post Facto* Clause. That conclusion comports perfectly with the dual purposes that underlie the Clause: ensuring fair notice so that individuals can rely on the laws in force at the time they engage in conduct, and sustaining the separation of powers while preventing the passage of vindictive legislation. The Court today thus not only brings about an "undefined enlargement of the *Ex Post Facto* Clause," *Collins*, 497 U. S., at 46, that conflicts with established precedent, it also fails to advance the Clause's fundamental purposes. For these reasons, I dissent.

# CHRISTENSEN ET AL. *v.* HARRIS COUNTY ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98–1167. Argued February 23, 2000—Decided May 1, 2000

The Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. § 201(*o*), permits States and their political subdivisions to compensate their employees for overtime work by granting them compensatory time in lieu of cash payment. If the employees do not use their accumulated compensatory time, the employer must pay cash compensation under certain circumstances. §§ 207(*o*)(3)–(4). Fearing the consequences of having to pay for accrued compensatory time, Harris County adopted a policy requiring its employees to schedule time off in order to reduce the amount of accrued time. Petitioners, county deputy sheriffs, sued, claiming that the FLSA does not permit an employer to compel an employee to use compensatory time in the absence of an agreement permitting the employer to do so. The District Court granted petitioners summary judgment and entered a declaratory judgment that the policy violated the FLSA. The Fifth Circuit reversed, holding that the FLSA did not speak to the issue and thus did not prohibit the county from implementing its policy.

*Held:* Nothing in the FLSA or its implementing regulations prohibits a public employer from compelling the use of compensatory time. Petitioners' claim that § 207(*o*)(5) implicitly prohibits compelled use of compensatory time in the absence of an agreement is unpersuasive. The proposition that when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode, *Raleigh & Gaston R. Co.* v. *Reid,* 13 Wall. 269, 270, does not resolve this case in petitioners' favor. Section 207(*o*)(5) provides that an employee who requests to use compensatory time must be permitted to do so unless the employer's operations would be unduly disrupted. The negative inference to be drawn is only that an employer may not deny a request for a reason other than that provided in § 207(*o*)(5). Section 207(*o*)(5) simply ensures that an employee receive some timely benefit for overtime work. The FLSA's nearby provisions reflect a similar concern. At bottom, the best reading of the FLSA is that it ensures liquidation of compensatory time; it says nothing about restricting an employer's efforts to *require* employees to use the time. Because the statute is silent on this issue and because the county's policy is entirely compatible with § 207(*o*)(5), petitioners cannot, as § 216(b) requires, prove that the county has violated § 207. Two other features of the FLSA support this interpretation: Employers are permitted to decrease the number of hours that employees work, and employers also may cash out accumulated compensatory time by paying the employee his regular hourly wage for each hour accrued. The county's policy merely involves doing both of these steps at once. A Department of Labor opinion letter taking the position that an employer may compel the use of compensatory time only if the employee has agreed in advance to such a practice is not entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. They are "entitled to respect," but only to the extent that they are persuasive, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140, which is not the case here. *Chevron* deference does apply to an agency interpretation contained in a regulation, but nothing in the Department of Labor's regulation even arguably requires that an employer's compelled use policy *must* be included in an agreement. And deference to an agency's interpretation of its regulation is warranted under *Auer* v. *Robbins*, 519 U. S. 452, 461, only when the regulation's language is ambiguous, which is not the case here. Pp. 582–588.

158 F. 3d 241, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in which SCALIA, J., joined except as to Part III. SOUTER, J., filed a concurring opinion, *post*, p. 589. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 589. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 592. BREYER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 596.

*Michael T. Leibig* argued the cause for petitioners. With him on the briefs were *Richard H. Cobb* and *Murray E. Malakoff*.

*Matthew D. Roberts* argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Waxman, Deputy Solicitor General Kneedler, Jonathan E. Nuechterlein, Allen H. Feldman*, and *Edward D. Sieger*.

*Michael P. Fleming* argued the cause for respondents. With him on the brief were *Michael A. Stafford, Bruce S. Powers,* and *William John Bux.**

JUSTICE THOMAS delivered the opinion of the Court.

Under the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.* (1994 ed. and Supp. III), States and their political subdivisions may compensate their employees for overtime by granting them compensatory time or "comp time," which entitles them to take time off work with full pay. § 207(*o*). If the employees do not use their accumulated compensatory time, the employer is obligated to pay cash compensation under certain circumstances. §§ 207(*o*)(3)–(4). Fearing the fiscal consequences of having to pay for accrued compensatory time, Harris County adopted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time. Employees of the Harris County Sheriff's Department sued, claiming that the FLSA prohibits such a policy. The Court of Appeals rejected their claim. Finding that nothing in the FLSA or its implementing regulations prohibits an employer from compelling the use of compensatory time, we affirm.

## I

### A

The FLSA generally provides that hourly employees who work in excess of 40 hours per week must be compensated for the excess hours at a rate not less than 1½ times their regular hourly wage. § 207(a)(1). Although this requirement did not initially apply to public-sector employers, Congress amended the FLSA to subject States and their political subdivisions to its constraints, at first on a limited basis, see Fair Labor Standards Amendments of 1966, Pub. L. 89–601, § 102(b), 80 Stat. 831 (extending the FLSA to certain categories of state and local employees), and then more broadly, see Fair Labor Standards Amendments of 1974, Pub. L. 93–259, §§ 6(a)(1)–(2), 88 Stat. 58–59 (extending the FLSA to all state and local employees, save elected officials and their staffs). States and their political subdivisions, however, did not feel the full force of this latter extension until our decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), which overruled our holding in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), that the FLSA could not constitutionally restrain traditional governmental functions.

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, Deborah Greenfield, James B. Coppess,* and *Laurence Gold;* for the International Association of Fire Fighters by *Thomas A. Woodley;* and for the National Association of Police Organizations by *Stephen R. McSpadden.*

*Jeffrey A. Hollingsworth* filed a brief for Spokane Valley Fire Protection District No. 1 as *amicus curiae* urging affirmance.

In the months following *Garcia*, Congress acted to mitigate the effects of applying the FLSA to States and their political subdivisions, passing the Fair Labor Standards Amendments of 1985, Pub. L. 99–150, 99 Stat. 787. See generally *Moreau* v. *Klevenhagen*, 508 U. S. 22, 26 (1993). Those amendments permit States and their political subdivisions to compensate employees for overtime by granting them compensatory time at a rate of 1½ hours for every hour worked. See 29 U. S. C. § 207(*o*)(1). To provide this form of compensation, the employer must arrive at an agreement or understanding with employees that compensatory time will be granted instead of cash compensation.[1] § 207(*o*)(2); 29 CFR § 553.23 (1999).

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[1] Such an agreement or understanding need not be formally reached and memorialized in writing, but instead can be arrived at informally, such as when an employee works overtime knowing that the employer rewards overtime with compensatory time. See 29 CFR § 553.23(c)(1) (1999).

The FLSA expressly regulates some aspects of accrual and preservation of compensatory time. For example, the FLSA provides that an employer must honor an employee's request to use compensatory time within a "reasonable period" of time following the request, so long as the use of the compensatory time would not "unduly disrupt" the employer's operations. § 207(*o*)(5); 29 CFR § 553.25 (1999). The FLSA also caps the number of compensatory time hours that an employee may accrue. After an employee reaches that maximum, the employer must pay cash compensation for additional overtime hours worked. § 207(*o*)(3)(A). In addition, the FLSA permits the employer at any time to cancel or "cash out" accrued compensatory time hours by paying the employee cash compensation for unused compensatory time. § 207(*o*)(3)(B); 29 CFR § 553.26(a) (1999). And the FLSA entitles the employee to cash payment for any accrued compensatory time remaining upon the termination of employment. § 207(*o*)(4).

## B

Petitioners are 127 deputy sheriffs employed by respondents Harris County, Texas, and its sheriff, Tommy B. Thomas (collectively, Harris County). It is undisputed that each of the petitioners individually agreed to accept compensatory time, in lieu of cash, as compensation for overtime.

As petitioners accumulated compensatory time, Harris County became concerned that it lacked the resources to pay monetary compensation to employees who worked overtime after reaching the statutory cap on compensatory time accrual and to employees who left their jobs with sizable reserves of accrued time. As a result, the county began looking for a way to reduce accumulated compensatory time. It wrote to the United States Department of Labor's Wage and Hour Division, asking "whether the Sheriff may schedule non-exempt employees to use or take compensatory time." Brief for Petitioners 18–19. The Acting Administrator of the Division replied:

> "[I]t is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed if the prior agreement specifically provides such a provision . . . .
>
> "Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time." Opinion Letter from Dept. of Labor, Wage and Hour Div. (Sept. 14, 1992), 1992 WL 845100 (Opinion Letter).

After receiving the letter, Harris County implemented a policy under which the employees' supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times.

Petitioners sued, claiming that the county's policy violates the FLSA because § 207(*o*)(5)—which requires that an employer reasonably accommodate employee requests to use compensatory time—provides the exclusive means of utilizing accrued time in the absence of an agreement or understanding permitting some other method. The District Court agreed, granting summary judgment for petitioners and entering a declaratory judgment that the county's policy violated the FLSA. *Moreau* v. *Harris County*, 945 F. Supp. 1067 (SD Tex. 1996). The Court of Appeals for the Fifth Circuit reversed, holding that the FLSA did not speak to the issue and thus did not prohibit the county from implementing its compensatory time policy. *Moreau* v. *Harris County*, 158 F. 3d 241 (1998). Judge Dennis concurred in part and dissented in part, concluding that the employer could not compel the employee to use compensatory time unless the employee agreed to such an arrangement in advance. *Id.*, at 247–251. We granted certiorari because the Courts of Appeals are divided on the issue.[2] 528 U. S. 926 (1999).

## II

Both parties, and the United States as *amicus curiae*, concede that nothing in the FLSA expressly prohibits a State or subdivision thereof from compelling employees to utilize accrued compensatory time. Petitioners and the United States, however, contend that the FLSA implicitly prohibits such a practice in the absence of an agreement or understanding authorizing compelled use.[3] Title 29 U. S. C. § 207(*o*)(5) provides:

> "An employee . . .
>
> "(A) who has accrued compensatory time off . . . , and
>
> "(B) who has requested the use of such compensatory time,
>
> "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency."

Petitioners and the United States rely upon the canon *expressio unius est exclusio alterius*, contending that the express grant of control to employees to use compensatory time, subject to the limitation regarding undue disruptions of workplace operations, implies that all other methods of spending compensatory time are precluded.[4]

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[2] Compare, *e. g., Collins* v. *Lobdell*, 188 F. 3d 1124, 1129–1130 (CA9 1999) (upholding employer's policy compelling compensatory time use), with *Heaton* v. *Moore*, 43 F. 3d 1176, 1180–1181 (CA8 1994) (striking down policy compelling compensatory time use), cert. denied *sub nom. Schriro* v. *Heaton*, 515 U. S. 1104 (1995).

[3] We granted certiorari on the question " '[w]hether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U. S. C. § 207(*o*), may, absent a preexisting agreement, require its employees to use accrued compensatory time?' " 528 U. S. 926, 927 (1999). As such, we decide this case on the assumption that no agreement or understanding exists between the employer and employees on the issue of compelled use of compensatory time.

We find this reading unpersuasive. We accept the proposition that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston R. Co.* v. *Reid,* 13 Wall. 269, 270 (1872). But that canon does not resolve this case in petitioners' favor. The "thing to be done" as defined by § 207(*o*)(5) is not the expenditure of compensatory time, as petitioners would have it. Instead, § 207(*o*)(5) is more properly read as a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. As such, the proper *expressio unius* inference is that an employer may not, at least in the absence of an agreement, deny an employee's request to use compensatory time for a reason other than that provided in § 207(*o*)(5). The canon's application simply does not prohibit an employer from telling an employee to take the benefits of compensatory time by scheduling time off work with full pay.

In other words, viewed in the context of the overall statutory scheme, § 207(*o*)(5) is better read not as setting forth the exclusive method by which compensatory time can be used, but as setting up a safeguard to ensure that an employee will receive timely compensation for working overtime. Section 207(*o*)(5) guarantees that, at the very minimum, an employee will get to use his compensatory time (*i. e.*, take time off work with full pay) unless doing so would disrupt the employer's operations. And it is precisely this concern over ensuring that employees can timely "liquidate" compensatory time that the Secretary of Labor identified in her own regulations governing § 207(*o*)(5):

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[4] JUSTICE STEVENS asserts that the parties never make this argument. See *post,* at 593, n. 1 (dissenting opinion). Although the United States and petitioners fail to make their arguments in Latin, we believe a fair reading of the briefs reveals reliance upon the *expressio unius* canon. See Brief for United States as *Amicus Curiae* 16 ("Congress . . . identified only one circumstance in which an employer may exercise some measure of control: when an employee requests the use of compensatory time, the employer must allow such use within a reasonable period of time except where the use would 'unduly disrupt' the employer's operations. 29 U. S. C. 207(*o*)(5). If Congress had intended for employers to exercise unilateral control over the use of compensatory time in other respects as well, it presumably would have so provided"); Reply Brief for Petitioners 4–6 (contending that the FLSA explicitly provides methods for reducing compensatory time and thus other means may not be used).

> "Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time." 29 CFR § 553.25(b) (1999).

This reading is confirmed by nearby provisions of the FLSA that reflect a similar concern for ensuring that the employee receive some timely benefit for overtime work. For example, § 207(*o*)(3)(A) provides that workers may not accrue more than 240 or 480 hours of compensatory time, depending upon the nature of the job. See also § 207(*o*)(2)(B) (conditioning the employer's ability to provide compensatory time upon the employee not accruing compensatory time in excess of the § 207(*o*)(3)(A) limits). Section 207(*o*)(3)(A) helps guarantee that employees only accrue amounts of compensatory time that they can reasonably use. After all, an employer does not need § 207(*o*)(3)(A)'s protection; it is free at any time to reduce the number of hours accrued by exchanging them for cash payment, § 207(*o*)(3)(B), or by halting the accrual of compensatory time by paying cash compensation for overtime work, 29 CFR § 553.26(a) (1999). Thus, § 207(*o*)(3)(A), like § 207(*o*)(5), reflects a concern that employees receive some timely benefit in exchange for overtime work. Moreover, on petitioners' view, the compensatory time exception enacted by Congress in the wake of *Garcia* would become a nullity when employees who refuse to use compensatory time reach the statutory maximums on accrual. Petitioners' position would convert § 207(*o*)(3)(A)'s shield into a sword, forcing employers to pay cash compensation instead of providing compensatory time to employees who work overtime.

At bottom, we think the better reading of § 207(*o*)(5) is that it imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so; that provision says nothing about restricting an employer's efforts to *require* employees to use compensatory time. Because the statute is silent on this issue and because Harris County's policy is entirely compatible with § 207(*o*)(5), petitioners cannot, as they are required to do by 29 U. S. C. § 216(b), prove that Harris County has violated § 207.

Our interpretation of § 207(*o*)(5)—one that does not prohibit employers from forcing employees to use compensatory time—finds support in two other features of the FLSA. First, employers remain free under the FLSA to decrease the number of hours that employees work. An employer may tell the employee to take off an afternoon, a day, or even an entire week. Cf. *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739 (1981) ("[T]he FLSA was designed . . . to ensure that each employee covered by the Act . . . would be protected from the evil of overwork . . ." (internal quotation marks and emphasis omitted)). Second, the FLSA explicitly permits an employer to cash out accumulated compensatory time by paying the employee his regular hourly wage for each hour accrued. § 207(*o*)(3)(B); 29 CFR § 553.27(a) (1999). Thus, under the FLSA an employer is free to require an employee to take time off work, and an employer is also free to use the money it would have paid in wages to cash out accrued compensatory time. The compelled use of compensatory time challenged in this case merely involves doing both of these steps at once. It would make little sense to interpret § 207(*o*)(5) to make the combination of the two steps unlawful when each independently is lawful.[5]

## III

In an attempt to avoid the conclusion that the FLSA does not prohibit compelled use of compensatory time, petitioners and the United States contend that we should defer to the Department of Labor's opinion letter, which takes the position that an employer may compel the use of compensatory time only if the employee has agreed in advance to such a practice. Specifically, they argue that the agency opinion letter is entitled to deference under our decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. *Id.*, at 842–844.

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[5] JUSTICE STEVENS does not dispute this argument. In fact, he expressly endorses half of it. See *post*, at 594, 595 (employer free to cash out compensatory time). Instead, JUSTICE STEVENS claims that we "stumbl[e]" by failing to identify "the relevant general rule" that employees have "a statutory right to compensation for overtime work payable in cash." *Post*, at 592. We fail to do so only because the general rule is not relevant to this case. Both parties to this case agreed that compensatory time would be provided in lieu of cash and thus § 207(a)'s general requirement of cash compensation is supplanted. Petitioners and the United States do assert that the requirement of cash compensation is relevant by analogy. They claim that an employer cannot compel compensatory time use because compensatory time should be treated like employee cash in the bank—that is, under the exclusive control of the employee. But this analogy is wholly inapt under the very terms of the FLSA. The FLSA grants significant control to the employer over accrued compensatory time. For example, the employer is free to buy out compensatory time at any time by providing cash compensation. § 207(*o*)(3)(B); 29 CFR § 553.27(a) (1999). Additionally, an employer is free to deny any request to use compensatory time when such use would unduly disrupt the employer's operations. § 207(*o*)(5)(B); 29 CFR § 553.25(d) (1999). The cash analogy is therefore directly undermined by unambiguous provisions of the statute.

Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. See, *e. g.*, *Reno* v. *Koray*, 515 U. S. 50, 61 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 256–258 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 157 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"). See generally 1 K. Davis & R. Pierce, Administrative Law Treatise § 3.5 (3d ed. 1994). Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade," *ibid.* See *Arabian American Oil Co., supra*, at 256–258. As explained above, we find unpersuasive the agency's interpretation of the statute at issue in this case.

Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation. But in this case the Department of Labor's regulation does not address the issue of compelled compensatory time. The regulation provides only that "[t]he agreement or understanding [between the employer and employee] *may* include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with [§207(*o*)]." 29 CFR §553.23(a)(2) (1999) (emphasis added). Nothing in the regulation even arguably requires that an employer's compelled use policy *must* be included in an agreement. The text of the regulation itself indicates that its command is permissive, not mandatory.

Seeking to overcome the regulation's obvious meaning, the United States asserts that the agency's opinion letter interpreting the regulation should be given deference under our decision in *Auer* v. *Robbins*, 519 U. S. 452 (1997). In *Auer*, we held that an agency's interpretation of its own regulation is entitled to deference. *Id.*, at 461. See also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945). But *Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.

* * *

As we have noted, no relevant statutory provision expressly or implicitly prohibits Harris County from pursuing its policy of forcing employees to utilize their compensatory time. In its opinion letter siding with the petitioners, the Department of Labor opined that "it is our position that neither the statute nor the regulations *permit* an employer to require an employee to use accrued compensatory time." Opinion Letter (emphasis added). But this view is exactly backwards. Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA. And the FLSA contains no such prohibition. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE SOUTER, concurring.

I join the opinion of the Court on the assumption that it does not foreclose a reading of the Fair Labor Standards Act of 1938 that allows the Secretary of Labor to issue regulations limiting forced use.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the judgment of the Court and all of its opinion except Part III, which declines to give effect to the position of the Department of Labor in this case because its opinion letter is entitled only to so-called "*Skidmore* deference," see *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). *Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to "legislative rules") authoritative effect. See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 259 (1991) (SCALIA, J., concurring in part and concurring in judgment). This former judicial attitude accounts for that provision of the 1946 Administrative Procedure Act which exempted "interpretative rules" (since they would not be authoritative) from the notice-and-comment requirements applicable to rulemaking, see 5 U. S. C. § 553(b)(A).

That era came to an end with our watershed decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984), which established the principle that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."* While *Chevron* in fact

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*I do not comprehend JUSTICE BREYER's contention, *post*, at 596–597 (dissenting opinion), that *Skidmore* deference—that special respect one gives to the interpretive views of the expert agency responsible for administering the statute—is not an anachronism because it may apply in "circumstances in which *Chevron*-type deference is inapplicable." *Chevron*-

involved an interpretive regulation, the rationale of the case was not limited to that context: "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Id.*, at 843, quoting *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974). Quite appropriately, therefore, we have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats. See, *e. g., INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 425 (1999) (adjudication); *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 256–257 (1995) (letter of Comptroller of the Currency); *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 647–648 (1990) (decision by Pension Benefit Guaranty Corp. to restore pension benefit plan); *Young* v. *Community Nutrition Institute*, 476 U. S. 974, 978–979 (1986) (Food and

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type deference can be inapplicable for only three reasons: (1) the statute is unambiguous, so there is no room for administrative interpretation; (2) no interpretation has been made by personnel of the agency responsible for administering the statute; or (3) the interpretation made by such personnel was not authoritative, in the sense that it does not represent the official position of the expert agency. All of these reasons preclude *Skidmore* deference as well. The specific example of the inapplicability of *Chevron* that JUSTICE BREYER posits, viz., "where one has doubt that Congress actually intended to delegate interpretive authority to the agency," *post*, at 597, appears to assume that, after finding a statute to be ambiguous, we must ask in addition, before we can invoke *Chevron* deference, whether Congress intended the ambiguity to be resolved by the administering agency. That is not so. *Chevron* establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency. The implausibility of Congress's leaving a highly significant issue unaddressed (and thus "delegating" its resolution to the administering agency) is assuredly one of the factors to be considered *in determining whether there is ambiguity*, see *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994), but once ambiguity is established the consequences of *Chevron* attach.

Drug Administration's "longstanding interpretation of the statute," reflected in no-action notice published in the Federal Register).

In my view, therefore, the position that the county's action in this case was unlawful unless permitted by the terms of an agreement with the sheriff's department employees warrants *Chevron* deference if it represents the authoritative view of the Department of Labor. The fact that it appears in a single opinion letter signed by the Acting Administrator of the Wage and Hour Division might not alone persuade me that it occupies that status. But the Solicitor General of the United States, appearing as an *amicus* in this action, has filed a brief, cosigned by the Solicitor of Labor, which represents the position set forth in the opinion letter to be the position of the Secretary of Labor. That alone, even without existence of the opinion letter, would in my view entitle the position to *Chevron* deference. What we said in a case involving an agency's interpretation of its own regulations applies equally, in my view, to an agency's interpretation of its governing statute:

> "Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack, *Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204, 212 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer* v. *Robbins,* 519 U. S. 452, 462 (1997).

I nonetheless join the judgment of the Court because, for the reasons set forth in Part II of its opinion, the Secretary's position does not seem to me a reasonable interpretation of the statute.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

Because the disagreement between the parties concerns the scope of an exception to a general rule, it is appropriate to begin with a correct identification of the relevant general rule. That rule gives all employees protected by the Fair Labor Standards Act of 1938 a statutory right to compensation for overtime work payable in cash, whether they work in the private sector of the economy or the public sector. 29 U. S. C. §§206, 207 (1994 ed. and Supp. III). In 1985, Congress enacted an exception to that general rule that permits States and their political subdivisions to use compensatory time instead of cash as compensation for overtime. The exception, however, is not applicable unless the public employer first arrives at an agreement with its employees to substitute that type of compensation for cash. §207(*o*); 29 CFR §553.23 (1999). As I read the statute, the employer has no right to impose compensatory overtime payment upon its employees except in accordance with the terms of the agreement authorizing its use.

The Court stumbles because it treats §207's limited and conditional exception as though it were the relevant general rule. The Court begins its opinion by correctly asserting that public employers may "compensate their employees for overtime by granting them compensatory time or 'comp time,' which entitles them to take time off work with full pay." *Ante*, at 578. It is not until it reaches the bottom of the second page, however, that the Court acknowledges that what appeared to be the relevant general rule is really an exception from the employees' basic right to be paid in cash. *Ante*, at 579.

In my judgment, the fact that no employer may lawfully make any use of "comp time" without a prior agreement with the affected employees is of critical importance in answering the question whether a particular method of using that form of noncash compensation may be imposed on those employees without their consent. Because their consent is a condition without which the employer cannot qualify for the exception from the general rule, it seems clear to me that their agreement must encompass the way in which the compensatory time may be used.

In an effort to avoid addressing this basic point, the Court mistakenly characterizes petitioners' central argument as turning upon the canon *expressio unius est exclusio alterius.*[1] According to the Court, petitioners and the United States as *amicus curiae* contend that because employees are granted the power under the Act to use their compensatory time subject solely to the employers' ability to make employees wait a "reasonable time" before using it, "all other methods of spending compensatory time are precluded." *Ante,* at 583. The Court concludes that *expressio unius* does not help petitioners because the "thing to be done" as prescribed by the statute (and because of which all other "things" are excluded) is simply a guarantee that employees will be allowed to make some use of compensatory time upon request, rather than an open-ended promise that employees will be able to choose (subject only to the "reasonable time" limitation) how to spend it. *Ibid.*

This description of the debate misses the primary thrust of petitioners' position. They do not, as the Court implies, contend that employers generally must afford employees essentially unlimited use of accrued comp time under the statute; the point is rather that rules regarding both the availability and the use of comp time must be contained within an *agreement.* The "thing to be done" under the Act is for the parties to come to terms. It is because they have not done so with respect to the use of comp time here that the county may not unilaterally force its expenditure.

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[1] It must be noted that neither petitioners' brief nor the brief for the United States as *amicus curiae* actually relies upon this canon. Indeed, the sole mention of it in either brief is in petitioners' statement of the case, in which petitioners refer in a single sentence to an argument made by the Court of Appeals for the Eighth Circuit in *Heaton* v. *Moore,* 43 F. 3d 1176 (1994) (rejecting compelled-use policy absent agreement to that effect), cert. denied *sub nom. Schriro* v. *Heaton,* 515 U. S. 1104 (1995).

The Court is thus likewise mistaken in its insistence that under petitioners' reading, the comp time exception "would become a nullity" because employees could "forc[e] employers to pay cash compensation instead of providing compensatory time" for overtime work. *Ante,* at 585. Quite the contrary, employers can only be "forced" either to abide by the arrangements to which they have agreed, or to comply with the basic statutory requirement that overtime compensation is payable in cash.

Moreover, as the Court points out, *ante,* at 580, 584, even absent an agreement on the way in which comp time may be used, employers may at any time require employees to "cash out" of accumulated comp time, thereby readily avoiding any forced payment of comp time employees may accrue. § 207(*o*)(3)(B); 29 CFR § 553.26(a) (1999). Neither can it be said that Congress somehow assumed that the right to force employees to use accumulated comp time was to be an implied term in all comp time agreements. Congress specifically contemplated that employees might well reach the statutory maximum of accrued comp time, by requiring, in § 207(*o*)(3)(A), that once the statutory maximum is reached, employers must compensate employees in the preferred form—cash—for every hour over the limit.

Finally, it is not without significance in the present case that the Government department responsible for the statute's enforcement shares my understanding of its meaning. Indeed, the Department of Labor made its position clear to the county itself in response to a direct question posed by the county before it decided—agency advice notwithstanding—to implement its forced-use policy nonetheless. The Department of Labor explained:

> "[A] public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed if the prior agreement specifically provides such a provision, and the employees have knowingly and voluntarily agreed to such provision . . . .
>
> "Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time." Opinion Letter from Dept. of Labor, Wage and Hour Div. (Sept. 14, 1992), 1992 WL 845100.

The Department, it should be emphasized, does not suggest that forced-use policies are *forbidden* by the statute or regulations. Rather, its judgment is simply that, in accordance with the basic rule governing compensatory time set down by the statutory and regulatory scheme, such policies may be pursued solely according to the parties' *agreement.* Because there is no reason to believe that the Department's opinion was anything but thoroughly considered and consistently observed, it unquestionably merits our respect. See *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140 (1944).[2]

In the end, I do not understand why it should be any more difficult for the parties to come to an agreement on this term of employment than on the antecedent question whether compensatory time may be used at all. State employers enjoy substantial bargaining power in negotiations with their employees; by regulation, agreements governing the availability and use of compensatory time can be essentially as informal as the parties wish. See 29 CFR § 553.23(c) (1999). And, as we have said, employers retain the ability to "cash out" of accrued leave at any time. That simple step is, after all, the method that the Department of Labor years ago suggested the county should pursue here, and that would achieve precisely the outcome the county has all along claimed it wants.

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[2] I should add that I fully agree with JUSTICE BREYER's comments on *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). See *post,* at 596–597 (dissenting opinion).

I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

JUSTICE SCALIA may well be right that the position of the Department of Labor, set forth in both brief and letter, is an "authoritative" agency view that warrants deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). *Ante*, at 590 (opinion concurring in part and concurring in judgment). But I do not object to the majority's citing *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944), instead. And I do disagree with JUSTICE SCALIA's statement that what he calls "*Skidmore* deference" is "an anachronism." *Ante*, at 589.

*Skidmore* made clear that courts may pay particular attention to the views of an expert agency where they represent "specialized experience," 323 U. S., at 139, even if they do not constitute an exercise of delegated lawmaking authority. The Court held that the "rulings, interpretations and opinions of" an agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.*, at 140; see also *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 157 (1991). As Justice Jackson wrote for the Court, those views may possess the "power to persuade," even where they lack the "power to control." *Skidmore*, *supra*, at 140.

*Chevron* made no relevant change. It simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations. See *Chevron*, *supra*, at 843–844. And, to the extent there may be circumstances in which *Chevron*-type deference is inapplicable—*e. g.,* where one has doubt that Congress actually intended to delegate interpretive authority to the agency (an "ambiguity" that *Chevron* does not presumptively leave to agency resolution)—I believe that *Skidmore* nonetheless retains legal vitality. If statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experience-based views of expert agencies.

I agree with JUSTICE STEVENS that, when "thoroughly considered and consistently observed," an agency's views, particularly in a rather technical case such as this one, "meri[t] our respect." *Ante,* at 595 (dissenting opinion). And, of course, I also agree with JUSTICE STEVENS that, for the reasons he sets forth, *ante,* at 592–594, the Labor Department's position in this matter is eminently reasonable, hence persuasive, whether one views that decision through *Chevron*'s lens, through *Skidmore*'s, or through both.

# UNITED STATES *v.* MORRISON ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99–5. Argued January 11, 2000—Decided May 15, 2000*

Petitioner Brzonkala filed suit, alleging, *inter alia,* that she was raped by respondents while the three were students at Virginia Polytechnic Institute, and that this attack violated 42 U. S. C. § 13981, which provides a federal civil remedy for the victims of gender-motivated violence. Respondents moved to dismiss on the grounds that the complaint failed to state a claim and that § 13981's civil remedy is unconstitutional. Petitioner United States intervened to defend the section's constitutionality. In dismissing the complaint, the District Court held that it stated a claim against respondents, but that Congress lacked authority to enact § 13981 under either the Commerce Clause or § 5 of the Fourteenth Amendment, which Congress had explicitly identified as the sources of federal authority for § 13981. The en banc Fourth Circuit affirmed.

*Held:* Section 13981 cannot be sustained under the Commerce Clause or § 5 of the Fourteenth Amendment. Pp. 607–627.

(a) The Commerce Clause does not provide Congress with authority to enact § 13981's federal civil remedy. A congressional enactment will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States* v. *Lopez,* 514 U. S. 549, 568, 577–578. Petitioners assert that § 13981 can be sustained under Congress' commerce power as a regulation of activity that substantially affects interstate commerce. The proper framework for analyzing such a claim is provided by the principles the Court set out in *Lopez.* First, in *Lopez,* the noneconomic, criminal nature of possessing a firearm in a school zone was central to the Court's conclusion that Congress lacks authority to regulate such possession. Similarly, gender-motivated crimes of violence are not, in any sense, economic activity. Second, like the statute at issue in *Lopez,* § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' regulation of interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce

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*Together with No. 99–29, *Brzonkala* v. *Morrison et al.,* also on certiorari to the same court.

to come within Congress' authority, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime. Third, although § 13981, unlike the *Lopez* statute, *is* supported by numerous findings regarding the serious impact of gender-motivated violence on victims and their families, these findings are substantially weakened by the fact that they rely on reasoning that this Court has rejected, namely, a but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. If accepted, this reasoning would allow Congress to regulate any crime whose nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption. Moreover, such reasoning will not limit Congress to regulating violence, but may be applied equally as well to family law and other areas of state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime and vindication of its victims. Congress therefore may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. Pp. 607–619.

(b) Section 5 of the Fourteenth Amendment, which permits Congress to enforce by appropriate legislation the constitutional guarantee that no State shall deprive any person of life, liberty, or property without due process, or deny any person equal protection of the laws, *City of Boerne* v. *Flores*, 521 U. S. 507, 517, also does not give Congress the authority to enact § 13981. Petitioners' assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence is supported by a voluminous congressional record. However, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the Amendment prohibits only state action, not private conduct. This was the conclusion reached in *United States* v. *Harris*, 106 U. S. 629, and the *Civil Rights Cases*, 109 U. S. 3, which were both decided shortly after the Amendment's adoption. The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time, who all had intimate knowledge and familiarity with the events surrounding the Amendment's adoption. Neither *United States* v. *Guest*, 383 U. S. 745, nor *District of Columbia* v. *Carter*, 409 U. S. 418, casts any doubt on the enduring vitality of the *Civil Rights Cases* and *Harris*.

Assuming that there has been gender-based disparate treatment by state authorities in these cases, it would not be enough to save § 13981's civil remedy, which is directed not at a State or state actor but at individuals who have committed criminal acts motivated by gender bias. Section 13981 visits no consequence on any Virginia public official involved in investigating or prosecuting Brzonkala's assault, and it is thus unlike any of the § 5 remedies this Court has previously upheld. See, *e. g., South Carolina* v. *Katzenbach,* 383 U. S. 301. Section 13981 is also different from previously upheld remedies in that it applies uniformly throughout the Nation, even though Congress' findings indicate that the problem addressed does not exist in all, or even most, States. In contrast, the § 5 remedy in *Katzenbach* was directed only to those States in which Congress found that there had been discrimination. Pp. 619–627.

169 F. 3d 820, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion, *post,* p. 627. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post,* p. 628. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, and in which SOUTER and GINSBURG, JJ., joined as to Part I–A, *post,* p. 655.

*Solicitor General Waxman* argued the cause for the United States in No. 99–5. With him on the briefs were *Acting Assistant Attorney General Ogden, Deputy Solicitor General Underwood, Barbara McDowell, Mark B. Stern, Alisa B. Klein,* and *Anne Murphy. Julie Goldsheid* argued the cause for petitioner in No. 99–29. With her on the briefs were *Martha F. Davis, Eileen N. Wagner, Carter G. Phillips, Richard D. Bernstein, Katherine L. Adams, Jacqueline Gerson Cooper,* and *Paul A. Hemmersbaugh.*

*Michael E. Rosman* argued the cause for respondents in both cases. With him on the brief for respondent Morrison were *Hans F. Bader* and *W. David Paxton. Joseph Graham Painter, Jr.,* filed a brief for respondent Crawford.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Janet Napolitano,* Attorney General of Arizona, *Eliot Spitzer,* Attorney General of New York, *Preeta D. Bansal,* Solicitor General, *Jennifer K. Brown,* Assistant Attorney General, and *Paula S. Bickett,* and by the Attorneys General for their respective jurisdictions as fol-

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U. S. C. § 13981, which provides a federal civil remedy for the

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lows: *Bruce M. Botelho* of Alaska, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Albert Benjamin "Ben" Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Jose A. Fuentes Agostini* of Puerto Rico, *Sheldon Whitehouse* of Rhode Island, *Paul G. Summers* of Tennessee, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *James E. Doyle* of Wisconsin; for the Association of Trial Lawyers of America by *Jeffrey Robert White;* for AYUDA, Inc., et al. by *Laura A. Foggan* and *Clifford M. Sloan;* for the Bar of the City of New York by *Leon Friedman, Ronald J. Tabak, Louis A. Craco, Jr., Greg Harris,* and *James F. Parver;* for Equal Rights Advocates et al. by *David S. Ettinger, Lisa R. Jaskol,* and *Mary-Christine Sungaila;* for International Law Scholars and Human Rights Experts by *Peter Weiss* and *Rhonda Copelon;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Norman Redlich, Marc D. Stern, Daniel F. Kolb, Barbara Arnwine, Thomas J. Henderson, Jeffrey Sinensky, Steven Freeman, Melvin Shralow, Eliot Mincberg,* and *Nadine Taub;* for Law Professors by *Bruce Ackerman, Vicki C. Jackson,* and *Judith Resnik;* for the National Network to End Domestic Violence et al. by *Bruce D. Sokler;* and for *Joseph R. Biden, Jr., pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama by *Bill Pryor,* Attorney General, *John J. Park, Jr.,* Assistant Attorney General, and *Jeffrey S. Sutton;* for the Institute for Justice et al. by *Richard A. Epstein, William H. Mellor, Clint Bolick, Scott G. Bullock, Timothy Lynch,* and *Robert A. Levy;* for the Claremont Institute Center for Constitutional Jurisprudence by *Edwin Meese III;* for the Clarendon Foundation by *Jay S. Bybee* and *Ronald D. Maines;* for the Eagle Forum Education & Legal Defense Fund by *Erik S. Jaffe* and *Phyllis Schlafly;* for the Independent Women's Forum by *Anita K. Blair, E. Duncan* victims of gender-motivated violence. The United States Court of Appeals for the Fourth Circuit, sitting en banc, struck down § 13981 because it concluded that Congress lacked constitutional authority to enact the section's civil remedy. Believing that these cases are controlled by our decisions in *United States* v. *Lopez*, 514 U. S. 549 (1995), *United States* v. *Harris*, 106 U. S. 629 (1883), and the *Civil Rights Cases*, 109 U. S. 3 (1883), we affirm.

## I

Petitioner Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994. In September of that year, Brzonkala met respondents Antonio Morrison and James Crawford, who were both students at Virginia Tech and members of its varsity football team. Brzonkala alleges that, within 30 minutes of meeting Morrison and Crawford, they assaulted and repeatedly raped her. After the attack, Morrison allegedly told Brzonkala, "You better not have any . . . diseases." Complaint ¶ 22. In the months following the rape, Morrison also allegedly announced in the dormitory's dining room that he "like[d] to get girls drunk and . . . ." *Id.*, ¶ 31. The omitted portions, quoted verbatim in the briefs on file with this Court, consist of boasting, debased remarks about what Morrison would do to women, vulgar remarks that cannot fail to shock and offend.

Brzonkala alleges that this attack caused her to become severely emotionally disturbed and depressed. She sought assistance from a university psychiatrist, who prescribed

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*Getchell, Jr.*, *J. William Boland*, and *Robert L. Hodges;* for the National Association of Criminal Defense Lawyers by *Theodore M. Cooperstein* and *Lisa Kemler;* for the Pacific Legal Foundation by *Anne M. Hayes* and *M. Reed Hopper;* for the Women's Freedom Network by *Robert L. King;* and for Rita Gluzman by *Alan E. Untereiner.*

*Michael P. Farris* filed a brief for the Center for the Original Intent of the Constitution as *amicus curiae.*

antidepressant medication. Shortly after the rape Brzonkala stopped attending classes and withdrew from the university.

In early 1995, Brzonkala filed a complaint against respondents under Virginia Tech's Sexual Assault Policy. During the school-conducted hearing on her complaint, Morrison admitted having sexual contact with her despite the fact that she had twice told him "no." After the hearing, Virginia Tech's Judicial Committee found insufficient evidence to punish Crawford, but found Morrison guilty of sexual assault and sentenced him to immediate suspension for two semesters.

Virginia Tech's dean of students upheld the judicial committee's sentence. However, in July 1995, Virginia Tech informed Brzonkala that Morrison intended to initiate a court challenge to his conviction under the Sexual Assault Policy. University officials told her that a second hearing would be necessary to remedy the school's error in prosecuting her complaint under that policy, which had not been widely circulated to students. The university therefore conducted a second hearing under its Abusive Conduct Policy, which was in force prior to the dissemination of the Sexual Assault Policy. Following this second hearing the Judicial Committee again found Morrison guilty and sentenced him to an identical 2-semester suspension. This time, however, the description of Morrison's offense was, without explanation, changed from "sexual assault" to "using abusive language."

Morrison appealed his second conviction through the university's administrative system. On August 21, 1995, Virginia Tech's senior vice president and provost set aside Morrison's punishment. She concluded that it was "'excessive when compared with other cases where there has been a finding of violation of the Abusive Conduct Policy,'" *Brzonkala* v. *Virginia Polytechnic Institute and State Univ.*, 132 F. 3d 950, 955 (CA4 1997). Virginia Tech did not inform Brzonkala of this decision. After learning from a newspaper that Morrison would be returning to Virginia Tech for the fall 1995 semester, she dropped out of the university.

In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia. Her complaint alleged that Morrison's and Crawford's attack violated § 13981 and that Virginia Tech's handling of her complaint violated Title IX of the Education Amendments of 1972, 86 Stat. 373–375, 20 U. S. C. §§ 1681–1688. Morrison and Crawford moved to dismiss this complaint on the grounds that it failed to state a claim and that § 13981's civil remedy is unconstitutional. The United States, petitioner in No. 99–5, intervened to defend § 13981's constitutionality.

The District Court dismissed Brzonkala's Title IX claims against Virginia Tech for failure to state a claim upon which relief can be granted. See *Brzonkala* v. *Virginia Polytechnic and State Univ.*, 935 F. Supp. 772 (WD Va. 1996). It then held that Brzonkala's complaint stated a claim against Morrison and Crawford under § 13981, but dismissed the complaint because it concluded that Congress lacked authority to enact the section under either the Commerce Clause or § 5 of the Fourteenth Amendment. *Brzonkala* v. *Virginia Polytechnic and State Univ.*, 935 F. Supp. 779 (WD Va. 1996).

A divided panel of the Court of Appeals reversed the District Court, reinstating Brzonkala's § 13981 claim and her Title IX hostile environment claim.[1] *Brzonkala* v. *Virginia Polytechnic and State Univ.*, 132 F. 3d 949 (CA4 1997). The full Court of Appeals vacated the panel's opinion and reheard the case en banc. The en banc court then issued an opinion affirming the District Court's conclusion that Brzonkala stated a claim under § 13981 because her complaint alleged a crime of violence and the allegations of Morrison's crude and derogatory statements regarding his treatment of women sufficiently indicated that his crime was motivated by gender animus.[2] Nevertheless, the court by a divided vote affirmed the District Court's conclusion that Congress lacked constitutional authority to enact § 13981's civil remedy. *Brzonkala* v. *Virginia Polytechnic and State Univ.*, 169 F. 3d 820 (CA4 1999). Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari. 527 U. S. 1068 (1999).

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[1] The panel affirmed the dismissal of Brzonkala's Title IX disparate treatment claim. See 132 F. 3d, at 961–962.

Section 13981 was part of the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941–1942. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." 42 U. S. C. § 13981(b). To enforce that right, subsection (c) declares:

> "A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

Section 13981 defines a "crim[e] of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." § 13981(d)(1). It also provides that the term "crime of violence" includes any

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[2] The en banc Court of Appeals affirmed the District Court's conclusion that Brzonkala failed to state a claim alleging disparate treatment under Title IX, but vacated the District Court's dismissal of her hostile environment claim and remanded with instructions for the District Court to hold the claim in abeyance pending this Court's decision in *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629 (1999). *Brzonkala* v. *Virginia Polytechnic and State Univ.*, 169 F. 3d 820, 827, n. 2 (CA4 1999). Our grant of certiorari did not encompass Brzonkala's Title IX claims, and we thus do not consider them in this opinion.

> "(A) . . . act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
>
> "(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken." § 13981(d)(2).

Further clarifying the broad scope of § 13981's civil remedy, subsection (e)(2) states that "[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." And subsection (e)(3) provides a § 13981 litigant with a choice of forums: Federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section.

Although the foregoing language of § 13981 covers a wide swath of criminal conduct, Congress placed some limitations on the section's federal civil remedy. Subsection (e)(1) states that "[n]othing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender." Subsection (e)(4) further states that § 13981 shall not be construed "to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree."

Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison,* 1 Cranch 137, 176 (1803) (Marshall, C. J.). Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said that a "Federal civil rights cause of action" is established "[p]ursuant to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." 42 U. S. C. § 13981(a). We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

## II

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. See *United States* v. *Lopez,* 514 U. S., at 568, 577–578 (KENNEDY, J., concurring); *United States* v. *Harris,* 106 U. S., at 635. With this presumption of constitutionality in mind, we turn to the question whether § 13981 falls within Congress' power under Article I, § 8, of the Constitution. Brzonkala and the United States rely upon the third clause of the section, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

As we discussed at length in *Lopez,* our interpretation of the Commerce Clause has changed as our Nation has developed. See 514 U. S., at 552–557; *id.,* at 568–574 (KENNEDY, J., concurring); *id.,* at 584, 593–599 (THOMAS, J., concurring). We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted. See *Lopez,* 514 U. S., at 555–556; *id.*, at 573–574 (KENNEDY, J., concurring).

*Lopez* emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds. *Id.*, at 557.

> "[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel,* the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.*, at 556–557 (quoting *Jones & Laughlin Steel, supra,* at 37).[3]

As we observed in *Lopez,* modern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power."

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[3] JUSTICE SOUTER's dissent takes us to task for allegedly abandoning *Jones & Laughlin Steel* in favor of an inadequate "federalism of some earlier time." *Post,* at 641–643, 655. As the foregoing language from *Jones & Laughlin Steel* makes clear however, this Court has always recognized a limit on the commerce power inherent in "our dual system of government." 301 U. S., at 37. It is the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries that disregards the Court's caution in *Jones & Laughlin Steel* against allowing that power to "effectually obliterate the distinction between what is national and what is local." *Ibid.*

514 U. S., at 558 (citing *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U. S. 264, 276–277 (1981); *Perez* v. *United States,* 402 U. S. 146, 150 (1971)). "First, Congress may regulate the use of the channels of interstate commerce." 514 U. S., at 558 (citing *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, 256 (1964); *United States* v. *Darby,* 312 U. S. 100, 114 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U. S., at 558 (citing *Shreveport Rate Cases,* 234 U. S. 342 (1914); *Southern R. Co.* v. *United States,* 222 U. S. 20 (1911); *Perez, supra,* at 150). "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i. e.,* those activities that substantially affect interstate commerce." 514 U. S., at 558–559 (citing *Jones & Laughlin Steel, supra,* at 37).

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry.

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of § 13981. In *Lopez,* we held that the Gun-Free School Zones Act of 1990, 18 U. S. C. § 922(q)(1)(A), which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. See 514 U. S., at 551. Several significant considerations contributed to our decision.

First, we observed that § 922(q) was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.*, at 561. Reviewing our case law, we noted that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." *Id.*, at 559. Although we cited only a few examples, including *Wickard* v. *Filburn*, 317 U. S. 111 (1942); *Hodel, supra; Perez, supra; Katzenbach* v. *McClung*, 379 U. S. 294 (1964); and *Heart of Atlanta Motel, supra*, we stated that the pattern of analysis is clear. *Lopez*, 514 U. S., at 559–560. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.*, at 560.

Both petitioners and JUSTICE SOUTER's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. See, *e. g., id.*, at 551 ("The Act [does not] regulat[e] a commercial activity"), 560 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not"), 561 ("Section 922(q) is not an essential part of a larger regulation of economic activity"), 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty' "), 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"); see also *id.*, at 573–574 (KENNEDY, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"), 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur"), 580 ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far" (citation omitted)). *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. See *id.*, at 559–560.[4]

The second consideration that we found important in analyzing § 922(q) was that the statute contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.*, at 562. Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.

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[4] JUSTICE SOUTER's dissent does not reconcile its analysis with our holding in *Lopez* because it apparently would cast that decision aside. See *post*, at 637–643. However, the dissent cannot persuasively contradict *Lopez*'s conclusion that, in every case where we have sustained federal regulation under the aggregation principle in *Wickard* v. *Filburn*, 317 U. S. 111 (1942), the regulated activity was of an apparent commercial character. See, *e. g.*, *Lopez*, 514 U. S., at 559–560, 580.

Third, we noted that neither § 922(q) " 'nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' " *Ibid.* (quoting Brief for United States, O. T. 1994, No. 93–1260, pp. 5–6). While "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," 514 U. S., at 562 (citing *McClung, supra,* at 304; *Perez,* 402 U. S., at 156), the existence of such findings may "enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." 514 U. S., at 563.

Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. *Id.*, at 563–567. The United States argued that the possession of guns may lead to violent crime, and that violent crime "can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." *Id.*, at 563–564 (citation omitted). The Government also argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive work force, which will negatively affect national productivity and thus interstate commerce. *Ibid.*

We rejected these "costs of crime" and "national productivity" arguments because they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.*, at 564. We noted that, under this but-for reasoning:

> "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Ibid.*

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. See, *e. g., id.*, at 559–560, and the cases cited therein.

Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime.[5]

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[5] Title 42 U. S. C. § 13981 is not the sole provision of the Violence Against Women Act of 1994 to provide a federal remedy for gender-motivated crime. Section 40221(a) of the Act creates a federal criminal remedy to

In contrast with the lack of congressional findings that we faced in *Lopez,* § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. See, *e. g.,* H. R. Conf. Rep. No. 103–711, p. 385 (1994); S. Rep. No. 103–138, p. 40 (1993); S. Rep. No. 101–545, p. 33 (1990). But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez,* " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " 514 U. S., at 557, n. 2 (quoting *Hodel,* 452 U. S., at 311 (REHNQUIST, J., concurring in judgment)). Rather, " '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.' " 514 U. S., at 557, n. 2 (quoting *Heart of Atlanta Motel,* 379 U. S., at 273 (Black, J., concurring)).

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punish "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." S. Rep. No. 103–138, p. 43 (1993). That criminal provision has been codified at 18 U. S. C. § 2261(a)(1), which states:

> "A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b)."

The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress' Commerce Clause authority, reasoning that "[t]he provision properly falls within the first of *Lopez's* categories as it regulates the use of channels of interstate commerce—i. e., the use of the interstate transportation routes through which persons and goods move." *United States* v. *Lankford,* 196 F. 3d 563, 571–572 (CA5 1999) (collecting cases) (internal quotation marks omitted).

In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce

> "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." H. R. Conf. Rep. No. 103–711, at 385.

Accord, S. Rep. No. 103–138, at 54. Given these findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. See *Lopez, supra,* at 564. The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez,* be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context.[6] See 42 U. S. C. § 13981(e)(4). Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.[7] See *Lopez, supra,* at 575–579 (KENNEDY, J., concurring); *Marbury,* 1 Cranch, at 176–178.

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[6] We are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area. In *Lopez,* 514 U. S., at 567, we quoted Justice Cardozo's concurring opinion in *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935):

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" *Id.,* at 554 (quoting *United States* v. *A. L. A. Schechter Poultry Corp.,* 76 F. 2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).

[7] JUSTICE SOUTER's theory that *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985), and the Seventeenth Amendment provide the answer to these cases, see *post,* at 645–652, is remarkable because it undermines this central principle of our constitutional system. As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power. See, *e. g., Arizona* v. *Evans,* 514 U. S. 1, 30 (1995) (GINSBURG, J., dissenting); *Gregory* v. *Ashcroft,* 501 U. S. 452, 458–459 (1991) (cataloging the benefits of the federal design); *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 242 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'") (quoting *Garcia, supra,* at 572 (Powell, J., dissenting)). Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the Legislature's self-restraint. See, *e. g., Marbury* v. *Madison,* 1 Cranch 137, 176 (1803) (Marshall, C. J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). It is thus a "'per-

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is

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manent and indispensable feature of our constitutional system'" that "'the federal judiciary is supreme in the exposition of the law of the Constitution.'" *Miller* v. *Johnson,* 515 U. S. 900, 922–923 (1995) (quoting *Cooper* v. *Aaron,* 358 U. S. 1, 18 (1958)).

No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States* v. *Nixon,* 418 U. S. 683 (1974): "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Id.,* at 703 (citation omitted).

Contrary to JUSTICE SOUTER's suggestion, see *post,* at 647–652, and n. 14, *Gibbons* did not exempt the commerce power from this cardinal rule of constitutional law. His assertion that, from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds.* As the language surrounding that relied upon by JUSTICE SOUTER makes clear, *Gibbons* did not remove from this Court the authority to define that boundary. See *Gibbons, supra,* at 194–195 ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . . Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State").

truly national and what is truly local. *Lopez,* 514 U. S., at 568 (citing *Jones & Laughlin Steel,* 301 U. S., at 30). In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. See, *e. g., Cohens* v. *Virginia,* 6 Wheat. 264, 426, 428 (1821) (Marshall, C. J.) (stating that Congress "has no general right to punish murder committed within any of the States," and that it is "clear . . . that congress cannot punish felonies generally"). Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[8] See, *e. g., Lopez,* 514 U. S., at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power"); *id.,* at 584–585 (THOMAS, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596–597, and n. 6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).

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[8] JUSTICE SOUTER disputes our assertion that the Constitution reserves the general police power to the States, noting that the Founders failed to adopt several proposals for additional guarantees against federal encroachment on state authority. See *post,* at 645–646, and n. 14. This argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate. See, *e. g., New York* v. *United States,* 505 U. S. 144, 156–157 (1992). And, as discussed above, the Constitution's separation of federal power and the creation of the Judicial Branch indicate that disputes regarding the extent of congressional power are largely subject to judicial review. See n. 7, *supra.* Moreover, the principle that "'[t]he Constitution created a Federal Government of limited powers,'" while reserving a generalized police power to the States, is deeply ingrained in our constitutional history. *New York, supra,* at 155 (quoting *Gregory* v. *Ashcroft, supra,* at 457); see also *Lopez,* 514 U. S., at 584–599 (THOMAS, J., concurring) (discussing the history of the debates surrounding the adoption of the Commerce Clause and our subsequent interpretation of the Clause); *Maryland* v. *Wirtz,* 392 U. S. 183, 196 (1968).

## III

Because we conclude that the Commerce Clause does not provide Congress with authority to enact § 13981, we address petitioners' alternative argument that the section's civil remedy should be upheld as an exercise of Congress' remedial power under § 5 of the Fourteenth Amendment. As noted above, Congress expressly invoked the Fourteenth Amendment as a source of authority to enact § 13981.

The principles governing an analysis of congressional legislation under § 5 are well settled. Section 5 states that Congress may "'enforce' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law,' nor deny any person 'equal protection of the laws.'" *City of Boerne* v. *Flores*, 521 U. S. 507, 517 (1997). Section 5 is "a positive grant of legislative power," *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966), that includes authority to "prohibi[t] conduct which is not itself unconstitutional and [to] intrud[e] into 'legislative spheres of autonomy previously reserved to the States.'" *Flores*, *supra*, at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 455 (1976)); see also *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 81 (2000). However, "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell*, 400 U. S. 112, 128 (1970); see also *Kimel*, *supra*, at 81. In fact, as we discuss in detail below, several limitations inherent in § 5's text and constitutional context have been recognized since the Fourteenth Amendment was adopted.

Petitioners' § 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. This assertion is supported by a voluminous congressional record. Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence. See H. R. Conf. Rep. No. 103–711, at 385–386; S. Rep. No. 103–138, at 38, 41–55; S. Rep. No. 102–197, at 33–35, 41, 43–47. Petitioners contend that this bias denies victims of gender-motivated violence the equal protection of the laws and that Congress therefore acted appropriately in enacting a private civil remedy against the perpetrators of gender-motivated violence to both remedy the States' bias and deter future instances of discrimination in the state courts.

As our cases have established, state-sponsored gender discrimination violates equal protection unless it "'serves "important governmental objectives and . . . the discriminatory means employed" are "substantially related to the achievement of those objectives."'" *United States* v. *Virginia,* 518 U. S. 515, 533 (1996) (quoting *Mississippi Univ. for Women* v. *Hogan,* 458 U. S. 718, 724 (1982), in turn quoting *Wengler* v. *Druggists Mut. Ins. Co.,* 446 U. S. 142, 150 (1980)). See also *Craig* v. *Boren,* 429 U. S. 190, 198–199 (1976). However, the language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government. See *Flores, supra,* at 520–524 (reviewing the history of the Fourteenth Amendment's enactment and discussing the contemporary belief that the Amendment "'does not concentrate power in the general government for any purpose of police government within the States' ") (quoting T. Cooley, Constitutional Limitations 294, n. 1 (2d ed. 1871)). Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U. S. 1, 13, and n. 12 (1948).

Shortly after the Fourteenth Amendment was adopted, we decided two cases interpreting the Amendment's provisions, *United States* v. *Harris*, 106 U. S. 629 (1883), and the *Civil Rights Cases*, 109 U. S. 3 (1883). In *Harris*, the Court considered a challenge to § 2 of the Civil Rights Act of 1871. That section sought to punish "private persons" for "conspiring to deprive any one of the equal protection of the laws enacted by the State." 106 U. S., at 639. We concluded that this law exceeded Congress' § 5 power because the law was "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers." *Id.*, at 640. In so doing, we reemphasized our statement from *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880), that " 'these provisions of the fourteenth amendment have reference to State action exclusively, and not to any action of private individuals.' " *Harris, supra*, at 639 (misquotation in *Harris*).

We reached a similar conclusion in the *Civil Rights Cases*. In those consolidated cases, we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power. 109 U. S., at 11 ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment"). See also, *e. g.*, *Romer* v.

*Evans,* 517 U. S. 620, 628 (1996) ("[I]t was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations"); *Lugar* v. *Edmondson Oil Co.,* 457 U. S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power"); *Blum* v. *Yaretsky,* 457 U. S. 991, 1002 (1982); *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 172 (1972); *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 147, n. 2 (1970); *United States* v. *Cruikshank,* 92 U. S. 542, 554 (1876) ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society").

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Petitioners contend that two more recent decisions have in effect overruled this longstanding limitation on Congress' § 5 authority. They rely on *United States* v. *Guest,* 383 U. S. 745 (1966), for the proposition that the rule laid down in the *Civil Rights Cases* is no longer good law. In *Guest,* the Court reversed the construction of an indictment under 18 U. S. C. § 241, saying in the course of its opinion that "we deal here with issues of statutory construction, not with issues of constitutional power." 383 U. S., at 749. Three Members of the Court, in a separate opinion by Justice Brennan, expressed the view that the *Civil Rights Cases* were wrongly decided, and that Congress could under §5 prohibit actions by private individuals. 383 U. S., at 774 (opinion concurring in part and dissenting in part). Three other Members of the Court, who joined the opinion of the Court, joined a separate opinion by Justice Clark which in two or three sentences stated the conclusion that Congress could "punis[h] all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." *Id.*, at 762 (concurring opinion). Justice Harlan, in another separate opinion, commented with respect to the statement by these Justices:

> "The action of three of the Justices who joined the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary." *Id.*, at 762, n. 1 (opinion concurring in part and dissenting in part).

Though these three Justices saw fit to opine on matters not before the Court in *Guest*, the Court had no occasion to revisit the *Civil Rights Cases* and *Harris*, having determined "the indictment [charging private individuals with conspiring to deprive blacks of equal access to state facilities] in fact contain[ed] an express allegation of state involvement." 383 U. S., at 756. The Court concluded that the implicit allegation of "active connivance by agents of the State" eliminated any need to decide "the threshold level that state action must attain in order to create rights under the Equal Protection Clause." *Ibid.* All of this Justice Clark explicitly acknowledged. See *id.*, at 762 (concurring opinion) ("The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities").

To accept petitioners' argument, moreover, one must add to the three Justices joining Justice Brennan's reasoned explanation for his belief that the *Civil Rights Cases* were wrongly decided, the three Justices joining Justice Clark's opinion who gave no explanation whatever for their similar view. This is simply not the way that reasoned constitutional adjudication proceeds. We accordingly have no hesitation in saying that it would take more than the naked dicta contained in Justice Clark's opinion, when added to Justice Brennan's opinion, to cast any doubt upon the enduring vitality of the *Civil Rights Cases* and *Harris.*

Petitioners also rely on *District of Columbia* v. *Carter,* 409 U. S. 418 (1973). *Carter* was a case addressing the question whether the District of Columbia was a "State" within the meaning of Rev. Stat. § 1979, 42 U. S. C. § 1983—a section which by its terms requires state action before it may be employed. A footnote in that opinion recites the same litany respecting *Guest* that petitioners rely on. This litany is of course entirely dicta, and in any event cannot rise above its source. We believe that the description of the § 5 power contained in the *Civil Rights Cases* is correct:

> "But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular [s]tate legislation or [s]tate action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of [s]tate officers." 109 U. S., at 18.

Petitioners alternatively argue that, unlike the situation in the *Civil Rights Cases,* here there has been gender-based disparate treatment by state authorities, whereas in those cases there was no indication of such state action. There is abundant evidence, however, to show that the Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981: There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. The statement of Representative Garfield in the House and that of Senator Sumner in the Senate are representative:

> "[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42d Cong., 1st Sess., App. 153 (1871) (statement of Rep. Garfield).
>
> "The Legislature of South Carolina has passed a law giving precisely the rights contained in your 'supplementary civil rights bill.' But such a law remains a dead letter on her statute-books, because the State courts, comprised largely of those whom the Senator wishes to obtain amnesty for, refuse to enforce it." Cong. Globe, 42d Cong., 2d Sess., 430 (1872) (statement of Sen. Sumner).

See also, *e. g.,* Cong. Globe, 42d Cong., 1st Sess., at 653 (statement of Sen. Osborn); *id.,* at 457 (statement of Rep. Coburn); *id.,* at App. 78 (statement of Rep. Perry); 2 Cong. Rec. 457 (1874) (statement of Rep. Butler); 3 Cong. Rec. 945 (1875) (statement of Rep. Lynch).

But even if that distinction were valid, we do not believe it would save § 13981's civil remedy. For the remedy is simply not "corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers." *Civil Rights Cases, supra,* at 18. Or, as we have phrased it in more recent cases, prophylactic legislation under § 5 must have a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank,* 527 U. S. 627, 639 (1999); *Flores,* 521 U. S., at 526. Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.

In the present cases, for example, § 13981 visits no consequence whatever on any Virginia public official involved in investigating or prosecuting Brzonkala's assault. The section is, therefore, unlike any of the § 5 remedies that we have previously upheld. For example, in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), Congress prohibited New York from imposing literacy tests as a prerequisite for voting because it found that such a requirement disenfranchised thousands of Puerto Rican immigrants who had been educated in the Spanish language of their home territory. That law, which we upheld, was directed at New York officials who administered the State's election law and prohibited them from using a provision of that law. In *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), Congress imposed voting rights requirements on States that, Congress found, had a history of discriminating against blacks in voting. The remedy was also directed at state officials in those States. Similarly, in *Ex parte Virginia,* 100 U. S. 339 (1880), Congress criminally punished state officials who intentionally discriminated in jury selection; again, the remedy was directed to the culpable state official.

Section 13981 is also different from these previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States. By contrast, the § 5 remedy upheld in *Katzenbach* v. *Morgan, supra,* was directed only to the State where the evil found by Congress existed, and in *South Carolina* v. *Katzenbach, supra*, the remedy was directed only to those States in which Congress found that there had been discrimination.

For these reasons, we conclude that Congress' power under §5 does not extend to the enactment of §13981.

## IV

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. But Congress' effort in §13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under §5 of the Fourteenth Amendment. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

*Affirmed.*

JUSTICE THOMAS, concurring.

The majority opinion correctly applies our decision in *United States* v. *Lopez*, 514 U. S. 549 (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994, 42 U. S. C. § 13981, exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.[1]

## I

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. See *Wickard* v. *Filburn,* 317 U. S. 111, 124–128 (1942); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U. S. 264, 277 (1981). The fact of such a substantial effect is not an issue for the courts in the first instance, *ibid.,* but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. See *ibid.* Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States* v. *Lopez,* 514 U. S. 549 (1995), is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce.[2] Passage of the Act in 1994 was preceded by four years of hearings,[3] which included testimony from physicians and law professors;[4] from survivors of rape and domestic violence;[5] and from representatives of state law enforcement and private business.[6] The record includes reports on gender bias from task forces in 21 States,[7] and we have the benefit of specific factual findings

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[1] Finding the law a valid exercise of Commerce Clause power, I have no occasion to reach the question whether it might also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.

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[2] It is true that these data relate to the effects of violence against women generally, while the civil rights remedy limits its scope to "crimes of violence motivated by gender"—presumably a somewhat narrower subset of acts. See 42 U. S. C. § 13981(b). But the meaning of "motivated by gender" has not been elucidated by lower courts, much less by this one, so the degree to which the findings rely on acts not redressable by the civil rights remedy is unclear. As will appear, however, much of the data seems to indicate behavior with just such motivation. In any event, adopting a cramped reading of the statutory text, and thereby increasing the constitutional difficulties, would directly contradict one of the most basic canons of statutory interpretation. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). Having identified the problem of violence against women, Congress may address what it sees as the most threatening manifestation; "reform may take one step at a time." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 489 (1955).

[3] See, *e. g.*, Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (1990); Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess. (1991) (S. Hearing 102–369); Violence Against Women, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992); Hearing on Domestic Violence, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Violent Crimes Against Women, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Violence Against Women: Fighting the Fear, Hearing before the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (S. Hearing 103–878); Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess. (1993); Domestic Violence: Not Just a Family Matter, Hearing before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 103d Cong., 2d Sess. (1994).

[4] See, *e. g.*, S. Hearing 103–596, at 1–4 (testimony of Northeastern Univ. Law School Professor Clare Dalton); S. Hearing 102–369, at 103–105 (testimony of Univ. of Chicago Professor Cass Sunstein); S. Hearing 103–878,

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at 7–11 (testimony of American Medical Assn. president-elect Robert McAfee).

[5] See, *e. g., id.*, at 13–17 (testimony of Lisa); *id.*, at 40–42 (testimony of Jennifer Tescher).

[6] See, *e. g.*, S. Hearing 102–369, at 24–36, 71–87 (testimony of attorneys general of Iowa and Illinois); *id.*, at 235–245 (testimony of National Federation of Business and Professional Women); S. Hearing No. 103–596, at 15–17 (statement of James Hardeman, Manager, Counseling Dept., Polaroid Corp.).

[7] See Judicial Council of California Advisory Committee on Gender Bias in the Courts, Achieving Equal Justice for Women and Men in the California Courts (July 1996) (edited version of 1990 report); Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender and Justice in the Colorado Courts (1990); Connecticut Task Force on Gender, Justice and the Courts, Report to the Chief Justice (Sept. 1991); Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990); Supreme Court of Georgia, Commission on Gender Bias in the Judicial System, Gender and Justice in the Courts (1991), reprinted in 8 Ga. St. U. L. Rev. 539 (1992); Report of the Illinois Task Force on Gender Bias in the Courts (1990); Equality in the Courts Task Force, State of Iowa, Final Report (Feb. 1993); Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (Jan. 1992); Louisiana Task Force on Women in the Courts, Final Report (1992); Maryland Special Joint Comm., Gender Bias in the Courts (May 1989); Massachusetts Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts (1989); Michigan Supreme Court Task Force on Gender Issues in the Courts, Final Report (Dec. 1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), reprinted in 15 Wm. Mitchell L. Rev. 825 (1989); Nevada Supreme Court Gender Bias Task Force, Justice for Women (1988); New Jersey Supreme Court Task Force on Women in the Courts, Report of the First Year (June 1984); Report of the New York Task Force on Women in the Courts (Mar. 1986); Final Report of the Rhode Island Supreme Court Committee on Women in the Courts (June 1987); Utah Task Force on Gender and Justice, Report to the Utah Judicial Council (Mar. 1990); Vermont Supreme Court and Vermont Bar Assn., Gender and Justice: Report of the Vermont Task Force on Gender Bias in the Legal System (Jan. 1991); Washington State Task Force on Gender and Justice

in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.[8] Cf. *Hodel,* 452 U. S., at 278–279 (noting "extended hearings," "vast amounts of testimony and documentary evidence," and "years of the most thorough legislative consideration").

With respect to domestic violence, Congress received evidence for the following findings:

> "Three out of four American women will be victims of violent crimes sometime during their life." H. R. Rep. No. 103–395, p. 25 (1993) (citing U. S. Dept. of Justice, Report to the Nation on Crime and Justice 29 (2d ed. 1988)).
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> "Violence is the leading cause of injuries to women ages 15 to 44 . . . ." S. Rep. No. 103–138, p. 38 (1993) (citing Surgeon General Antonia Novello, From the Surgeon General, U. S. Public Health Services, 267 JAMA 3132 (1992)).
>
> "[A]s many as 50 percent of homeless women and children are fleeing domestic violence." S. Rep. No. 101–545, p. 37 (1990) (citing E. Schneider, Legal Reform Efforts for Battered Women: Past, Present, and Future (July 1990)).
>
> "Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others." S. Rep. No. 101–

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in the Courts, Final Report (1989); Wisconsin Equal Justice Task Force, Final Report (Jan. 1991).

[8] See S. Rep. No. 101–545 (1990); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: The Increase of Rape in America, 102d Cong., 1st Sess. (Comm. Print 1991); S. Rep. No. 102–197 (1991); Majority Staff of Senate Committee on the Judiciary, Violence Against Women: A Week in the Life of America, 102d Cong., 2d Sess. (Comm. Print 1992); S. Rep. No. 103–138 (1993); Majority Staff of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess. (Comm. Print 1993); H. R. Rep. No. 103–395 (1993); H. R. Conf. Rep. No. 103–711 (1994).

545, at 30 (citing Bureau of Justice Statistics, Criminal Victimization in the United States (1974) (Table 5)).

"[B]attering 'is the single largest cause of injury to women in the United States.'" S. Rep. No. 101–545, at 37 (quoting Van Hightower & McManus, Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies, 49 Pub. Admin. Rev. 269 (May/June 1989).

"An estimated 4 million American women are battered each year by their husbands or partners." H. R. Rep. No. 103–395, at 26 (citing Council on Scientific Affairs, American Medical Assn., Violence Against Women: Relevance for Medical Practitioners, 267 JAMA 3184, 3185 (1992).

"Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners." S. Rep. No. 101–545, at 37 (citing Stark & Flitcraft, Medical Therapy as Repression: The Case of the Battered Woman, Health & Medicine (Summer/Fall 1982).

"Between 2,000 and 4,000 women die every year from [domestic] abuse." S. Rep. No. 101–545, at 36 (citing Schneider, *supra*).

"[A]rrest rates may be as low as 1 for every 100 domestic assaults." S. Rep. No. 101–545, at 38 (citing Dutton, Profiling of Wife Assaulters: Preliminary Evidence for Trimodal Analysis, 3 Violence and Victims 5–30 (1988)).

"Partial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year." S. Rep. No. 101–545, at 33 (citing Schneider, *supra*, at 4).

"[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103–138, at

> 41 (citing Biden, Domestic Violence: A Crime, Not a Quarrel, Trial 56 (June 1993)).

The evidence as to rape was similarly extensive, supporting these conclusions:

> "[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years." S. Rep. No. 101–545, at 30 (citing Federal Bureau of Investigation Uniform Crime Reports (1988)).
>
> "According to one study, close to half a million girls now in high school will be raped before they graduate." S. Rep. No. 101–545, at 31 (citing R. Warshaw, I Never Called it Rape 117 (1988)).
>
> "[One hundred twenty-five thousand] college women can expect to be raped during this—or any—year." S. Rep. No. 101–545, at 43 (citing testimony of Dr. Mary Koss before the Senate Judiciary Committee, Aug. 29, 1990).
>
> "[T]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason." S. Rep. No. 102–197, p. 38 (1991) (citing M. Gordon & S. Riger, The Female Fear 15 (1989)).
>
> "[Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims." S. Rep. No. 102–197, at 47 (citing Colorado Supreme Court Task Force on Gender Bias in the Courts, Gender & Justice in the Colorado Courts 91 (1990)).
>
> "Less than 1 percent of all [rape] victims have collected damages." S. Rep. No. 102–197, at 44 (citing report by Jury Verdict Research, Inc.).
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> "'[A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.'" S. Rep. No. 101–545, at 33, n. 30

(quoting H. Feild & L. Bienen, Jurors and Rape: A Study in Psychology and Law 95 (1980)).

"Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months." S. Rep. No. 103–138, at 38 (citing Majority Staff Report of Senate Committee on the Judiciary, The Response to Rape: Detours on the Road to Equal Justice, 103d Cong., 1st Sess., 2 (Comm. Print 1993)).

"[A]lmost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity." S. Rep. No. 102–197, at 53 (citing Ellis, Atkeson, & Calhoun, An Assessment of Long-Term Reaction to Rape, 90 J. Abnormal Psych., No. 3, p. 264 (1981).

Based on the data thus partially summarized, Congress found that

> "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . [,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . ." H. R. Conf. Rep. No. 103–711, p. 385 (1994).

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned. Cf. *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180, 199 (1997)

("The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process").

Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges. In *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964), and *Katzenbach* v. *McClung*, 379 U. S. 294 (1964), the Court referred to evidence showing the consequences of racial discrimination by motels and restaurants on interstate commerce. Congress had relied on compelling anecdotal reports that individual instances of segregation cost thousands to millions of dollars. See Civil Rights—Public Accommodations, Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., App. V, pp. 1383–1387 (1963). Congress also had evidence that the average black family spent substantially less than the average white family in the same income range on public accommodations, and that discrimination accounted for much of the difference. H. R. Rep. No. 88–914, pt. 2, pp. 9–10, and Table II (1963) (Additional Views on H. R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell).

While Congress did not, to my knowledge, calculate aggregate dollar values for the nationwide effects of racial discrimination in 1964, in 1994 it did rely on evidence of the harms caused by domestic violence and sexual assault, citing annual costs of $3 billion in 1990, see S. Rep. 101–545, at 33, and $5 to $10 billion in 1993, see S. Rep. No. 103–138, at 41.[9] Equally important, though, gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce. Like racial discrimination, "[g]ender-based violence bars its most likely targets—women—from full partic[ipation] in the national economy." *Id.*, at 54.

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[9] In other cases, we have accepted dramatically smaller figures. See, *e. g., Hodel* v. *Indiana*, 452 U. S. 314, 325, n. 11 (1981) (stating that corn production with a value of $5.16 million "surely is not an insignificant amount of commerce").

If the analogy to the Civil Rights Act of 1964 is not plain enough, one can always look back a bit further. In *Wickard*, we upheld the application of the Agricultural Adjustment Act to the planting and consumption of homegrown wheat. The effect on interstate commerce in that case followed from the possibility that wheat grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market. See 317 U. S., at 127–129. The Commerce Clause predicate was simply the effect of the production of wheat for home consumption on supply and demand in interstate commerce. Supply and demand for goods in interstate commerce will also be affected by the deaths of 2,000 to 4,000 women annually at the hands of domestic abusers, see S. Rep. No. 101–545, at 36, and by the reduction in the work force by the 100,000 or more rape victims who lose their jobs each year or are forced to quit, see *id.*, at 56; H. R. Rep. No. 103–395, at 25–26. Violence against women may be found to affect interstate commerce and affect it substantially.[10]

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[10] It should go without saying that my view of the limit of the congressional commerce power carries no implication about the wisdom of exercising it to the limit. I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so. See Hearings before a Subcommittee of the House Committee on Appropriations, 104th Cong., 1st Sess., pt. 7, pp. 13–14 (1995) (testimony of JUSTICE KENNEDY); Hearings on H. R. 4603 before a Subcommittee of the Senate Committee on Appropriations, 103d Cong., 2d Sess., 100–107 (1994) (testimony of JUSTICES

## II

The Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I, §8, cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. As already noted, this understanding was secure even against the turmoil at the passage of the Civil Rights Act of 1964, in the aftermath of which the Court not only reaffirmed the cumulative effects and rational basis features of the substantial effects test, see *Heart of Atlanta, supra,* at 258; *McClung, supra,* at 301–305, but declined to limit the commerce power through a formal distinction between legislation focused on "commerce" and statutes addressing "moral and social wrong[s]," *Heart of Atlanta, supra,* at 257.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

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KENNEDY and SOUTER). The Judicial Conference of the United States originally opposed the Act, though after the original bill was amended to include the gender-based animus requirement, the objection was withdrawn for reasons that are not apparent. See Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 70–71 (1993).

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress's findings of fact are "weakened" by the presence of a disfavored "method of reasoning." *Ante,* at 615. This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.

This new characterization of substantial effects has no support in our cases (the self-fulfilling prophecies of *Lopez* aside), least of all those the majority cites. Perhaps this explains why the majority is not content to rest on its cited precedent but claims a textual justification for moving toward its new system of congressional deference subject to selective discounts. Thus it purports to rely on the sensible and traditional understanding that the listing in the Constitution of some powers implies the exclusion of others unmentioned. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 195 (1824); *ante,* at 610; The Federalist No. 45, p. 313 (J. Cooke ed. 1961) (J. Madison).[11] The majority stresses that Art. I, § 8, enumerates the powers of Congress, including the commerce power, an enumeration implying the exclusion of powers not enumerated. It follows, for the majority, not only that there must be some limits to "commerce," but that some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects. Such exclusions come into sight when the activity regulated is not itself commercial or when the States have traditionally addressed it in the exercise of the general police power, conferred under the state constitutions but never extended to Congress under the Constitution of the Nation, see *Lopez*, 514 U. S., at 566. *Ante*, at 615–616.

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[11] The claim that powers not granted were withheld was the chief Federalist argument against the necessity of a bill of rights. Bills of rights, Hamilton claimed, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84, at 578. James Wilson went further in the Pennsylvania ratifying convention, asserting that an enumeration of rights was positively dangerous because it suggested, conversely, that every right not reserved was surrendered. See 2 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 436–437 (2d ed. 1863) (hereinafter Elliot's Debates). The Federalists did not, of course, prevail on this point; most States voted for the Constitution only after proposing amendments and the First Congress speedily adopted a Bill of Rights. See *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528, 569 (1985) (Powell, J., dissenting). While that document protected a range of specific individual

The premise that the enumeration of powers implies that other powers are withheld is sound; the conclusion that some particular categories of subject matter are therefore presumptively beyond the reach of the commerce power is, however, a non sequitur. From the fact that Art. I, § 8, cl. 3, grants an authority limited to regulating commerce, it follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress.[12] My dis-

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rights against federal infringement, it did not, with the possible exception of the Second Amendment, offer any similarly specific protections to areas of state sovereignty.

[12] To the contrary, we have always recognized that while the federal commerce power may overlap the reserved state police power, in such cases federal authority is supreme. See, *e. g., Lake Shore & Michigan Southern R. Co.* v. *Ohio*, 173 U. S. 285, 297–298 (1899) ("When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government"); *United States* v. *California*, 297 U. S. 175, 185 (1936) ("[W]e look to the activities

agreement with the majority is not, however, confined to logic, for history has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory.

### A

Obviously, it would not be inconsistent with the text of the Commerce Clause itself to declare "noncommercial" primary activity beyond or presumptively beyond the scope of the commerce power. That variant of categorical approach is not, however, the sole textually permissible way of defining the scope of the Commerce Clause, and any such neat limitation would at least be suspect in the light of the final sentence of Art. I, § 8, authorizing Congress to make "all Laws . . . necessary and proper" to give effect to its enumerated powers such as commerce. See *United States* v. *Darby*, 312 U. S. 100, 118 (1941) ("The power of Congress . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce"). Accordingly, for significant periods of our history, the Court has defined the commerce power as plenary, unsusceptible to categorical exclusions, and this was the view expressed throughout the latter part of the 20th century in the substantial effects test. These two conceptions of the commerce power, plenary and categorically limited, are in fact old rivals, and today's revival of their competition summons up familiar history, a brief reprise of which may be helpful in posing what I take to be the key question going to the legitimacy of the majority's decision to breathe new life into the approach of categorical limitation.

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in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce").

Chief Justice Marshall's seminal opinion in *Gibbons* v. *Ogden,* 9 Wheat., at 193–194, construed the commerce power from the start with "a breadth never yet exceeded," *Wickard* v. *Filburn,* 317 U. S., at 120. In particular, it is worth noting, the Court in *Wickard* did not regard its holding as exceeding the scope of Chief Justice Marshall's view of interstate commerce; *Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming consistently with Chief Justice Marshall's indication that the commerce power may be understood by its exclusion of subjects, among others, "which do not affect other States," *Gibbons,* 9 Wheat., at 195. This plenary view of the power has either prevailed or been acknowledged by this Court at every stage of our jurisprudence. See, *e. g., id.,* at 197; *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96, 99–100 (1888); *Lottery Case,* 188 U. S. 321, 353 (1903); *Minnesota Rate Cases,* 230 U. S. 352, 398 (1913); *United States* v. *California,* 297 U. S. 175, 185 (1936); *United States* v. *Darby, supra,* at 115; *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S., at 255; *Hodel* v. *Indiana,* 452 U. S., at 324. And it was this understanding, free of categorical qualifications, that prevailed in the period after 1937 through *Lopez,* as summed up by Justice Harlan: " 'Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.' " *Maryland* v. *Wirtz,* 392 U. S. 183, 190 (1968) (quoting *Katzenbach* v. *McClung,* 379 U. S., at 303–304).

Justice Harlan spoke with the benefit of hindsight, for he had seen the result of rejecting the plenary view, and today's attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near tragedy that I outlined in

*United States* v. *Lopez,* 514 U. S., at 603 (dissenting opinion). In the half century following the modern activation of the commerce power with passage of the Interstate Commerce Act in 1887, this Court from time to time created categorical enclaves beyond congressional reach by declaring such activities as "mining," "production," "manufacturing," and union membership to be outside the definition of "commerce" and by limiting application of the effects test to "direct" rather than "indirect" commercial consequences. See, *e. g., United States* v. *E. C. Knight Co.,* 156 U. S. 1 (1895) (narrowly construing the Sherman Antitrust Act in light of the distinction between "commerce" and "manufacture"); *In re Heff,* 197 U. S. 488, 505–506 (1905) (stating that Congress could not regulate the intrastate sale of liquor); *The Employers' Liability Cases,* 207 U. S. 463, 495–496 (1908) (invalidating law governing tort liability for common carriers operating in interstate commerce because the effects on commerce were indirect); *Adair* v. *United States,* 208 U. S. 161 (1908) (holding that labor union membership fell outside "commerce"); *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918) (invalidating law prohibiting interstate shipment of goods manufactured with child labor as a regulation of "manufacture"); *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 545–548 (1935) (invalidating regulation of activities that only "indirectly" affected commerce); *Railroad Retirement Bd.* v. *Alton R. Co.,* 295 U. S. 330, 368–369 (1935) (invalidating pension law for railroad workers on the grounds that conditions of employment were only indirectly linked to commerce); *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 303–304 (1936) (holding that regulation of unfair labor practices in mining regulated "production," not "commerce").

Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937), which brought the earlier and nearly disastrous experiment to an end. And yet today's decision can only be seen as a step toward recapturing the prior mistakes. Its revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard,* which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, see *Lopez, supra,* at 580 (opinion of KENNEDY, J.), is cousin to the intent-based analysis employed in *Hammer, supra,* at 271–272, but rejected for Commerce Clause purposes in *Heart of Atlanta, supra,* at 257, and *Darby,* 312 U. S., at 115.

Why is the majority tempted to reject the lesson so painfully learned in 1937? An answer emerges from contrasting *Wickard* with one of the predecessor cases it superseded. It was obvious in *Wickard* that growing wheat for consumption right on the farm was not "commerce" in the common vocabulary,[13] but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially. Just a few years before

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[13] Contrary to the Court's suggestion, *ante,* at 611, n. 4, *Wickard* v. *Filburn,* 317 U. S. 111 (1942), applied the substantial effects test to domestic agricultural production for domestic consumption, an activity that cannot fairly be described as commercial, despite its commercial consequences in affecting or being affected by the demand for agricultural products in the commercial market. The *Wickard* Court admitted that Filburn's activity "may not be regarded as commerce" but insisted that "it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." *Id.,* at 125. The characterization of home wheat production as "commerce" or not is, however, ultimately beside the point. For if substantial effects on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial? Cf., *e. g., National Organization for Women, Inc.* v. *Scheidler,* 510 U. S. 249, 258 (1994) ("An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives"). The Court's answer is that it makes a difference to federalism, and the legitimacy of the Court's new judicially derived federalism is the crux of our disagreement. See *infra,* at 644–646.

*Wickard,* however, it had certainly been no less obvious that "mining" practices could substantially affect commerce, even though *Carter Coal Co., supra,* had held mining regulation beyond the national commerce power. When we try to fathom the difference between the two cases, it is clear that they did not go in different directions because the *Carter Coal* Court could not understand a causal connection that the *Wickard* Court could grasp; the difference, rather, turned on the fact that the Court in *Carter Coal* had a reason for trying to maintain its categorical, formalistic distinction, while that reason had been abandoned by the time *Wickard* was decided. The reason was laissez-faire economics, the point of which was to keep government interference to a minimum. See *Lopez, supra,* at 605–606 (SOUTER, J., dissenting). The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible. Without the animating economic theory, there was no point in contriving formalisms in a war with Chief Justice Marshall's conception of the commerce power.

If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard,* the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. This conception is the subject of the majority's second categorical discount applied today to the facts bearing on the substantial effects test.

### B

The Court finds it relevant that the statute addresses conduct traditionally subject to state prohibition under domestic criminal law, a fact said to have some heightened significance when the violent conduct in question is not itself aimed directly at interstate commerce or its instrumentalities. *Ante,* at 609. Again, history seems to be recycling, for the theory of traditional state concern as grounding a limiting principle has been rejected previously, and more than once. It was disapproved in *Darby,* 312 U. S., at 123–124, and held insufficient standing alone to limit the commerce power in *Hodel,* 452 U. S., at 276–277. In the particular context of the Fair Labor Standards Act it was rejected in *Maryland* v. *Wirtz,* 392 U. S. 183 (1968), with the recognition that "[t]here is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." *Id.,* at 195 (internal quotation marks omitted). The Court held it to be "clear that the Federal Government, when acting within a delegated power, may override countervailing state interests, whether these be described as 'governmental' or 'proprietary' in character." *Ibid.* While *Wirtz* was later overruled by *National League of Cities* v. *Usery,* 426 U. S.

833 (1976), that case was itself repudiated in *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985), which held that the concept of "traditional governmental function" (as an element of the immunity doctrine under *Hodel*) was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other. 469 U. S., at 546–547. The effort to carve out inviolable state spheres within the spectrum of activities substantially affecting commerce was, of course, just as irreconcilable with *Gibbons*'s explanation of the national commerce power as being as "absolut[e] as it would be in a single government," 9 Wheat., at 197.[14]

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[14] The Constitution of 1787 did, in fact, forbid some exercises of the commerce power. Article I, § 9, cl. 6, barred Congress from giving preference to the ports of one State over those of another. More strikingly, the Framers protected the slave trade from federal interference, see Art. I, § 9, cl. 1, and confirmed the power of a State to guarantee the chattel status of slaves who fled to another State, see Art. IV, § 2, cl. 3. These reservations demonstrate the plenary nature of the federal power; the exceptions prove the rule. Apart from them, proposals to carve islands of state authority out of the stream of commerce power were entirely unsuccessful. Roger Sherman's proposed definition of federal legislative power as excluding "matters of internal police" met Gouverneur Morris's response that "[t]he internal police . . . ought to be infringed in many cases" and was voted down eight to two. 2 Records of the Federal Convention of 1787, pp. 25–26 (M. Farrand ed. 1911) (hereinafter Farrand). The Convention similarly rejected Sherman's attempt to include in Article V a proviso that "no state shall . . . be affected in its internal police." 5 Elliot's Debates 551–552. Finally, Rufus King suggested an explicit bill of rights for the States, a device that might indeed have set aside the areas the Court now declares off-limits. 1 Farrand 493 ("As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of States in the National Constitution"). That proposal, too, came to naught. In short, to suppose that enumerated powers must have limits is sensible; to maintain that there exist judicially identifiable areas of state regulation immune to the plenary congressional commerce

The objection to reviving traditional state spheres of action as a consideration in commerce analysis, however, not only rests on the portent of incoherence, but is compounded by a further defect just as fundamental. The defect, in essence, is the majority's rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.[15] Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and Marshall understood the Constitution very differently.

Although Madison had emphasized the conception of a National Government of discrete powers (a conception that a number of the ratifying conventions thought was too indeterminate to protect civil liberties),[16] Madison himself must have sensed the potential scope of some of the powers granted (such as the authority to regulate commerce), for he

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power even though falling within the limits defined by the substantial effects test is to deny our constitutional history.

[15] That the national economy and the national legislative power expand in tandem is not a recent discovery. This Court accepted the prospect well over 100 years ago, noting that the commerce powers "are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9 (1878). See also, *e. g., Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 211–212 (1930) ("Primitive conditions have passed; business is now transacted on a national scale").

[16] As mentioned in n. 11, *supra*, many state conventions voted in favor of the Constitution only after proposing amendments. See 1 Elliot's Debates 322–323 (Massachusetts), 325 (South Carolina), 325–327 (New Hampshire), 327 (Virginia), 327–331 (New York), 331–332 (North Carolina), 334–337 (Rhode Island).

took care in The Federalist No. 46 to hedge his argument for limited power by explaining the importance of national politics in protecting the States' interests. The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p. 319 (J. Cooke ed. 1961). James Wilson likewise noted that "it was a favorite object in the Convention" to secure the sovereignty of the States, and that it had been achieved through the structure of the Federal Government. 2 Elliot's Debates 438–439.[17] The Framers of the Bill of Rights, in turn, may well have sensed that Madison and Wilson were right about politics as the determinant of the federal balance within the broad limits of a power like commerce, for they formulated the Tenth Amendment without any provision comparable to the specific guarantees proposed for individual liberties.[18] In any case, this Court recognized the political component of federalism in the seminal *Gibbons* opinion. After declaring the plenary character of congressional power within the sphere of activity affecting commerce, the Chief Justice spoke for the Court in explaining that there was only one restraint on its valid exercise:

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[17] Statements to similar effect pervade the ratification debates. See, *e. g.*, 2 *id.*, at 166–170 (Massachusetts, remarks of Samuel Stillman); 2 *id.*, at 251–253 (New York, remarks of Alexander Hamilton); 4 *id.*, at 95–98 (North Carolina, remarks of James Iredell).

[18] The majority's special solicitude for "areas of traditional state regulation," *ante*, at 615, is thus founded not on the text of the Constitution but on what has been termed the "*spirit* of the Tenth Amendment," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S., at 585 (O'CONNOR, J., dissenting) (emphasis in original). Susceptibility to what Justice Holmes more bluntly called "some invisible radiation from the general terms of the Tenth Amendment," *Missouri* v. *Holland*, 252 U. S. 416, 434 (1920), has increased in recent years, in disregard of his admonition that "[w]e must consider what this country has become in deciding what that Amendment has reserved," *ibid.*

> "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons*, 9 Wheat., at 197.

Politics as the moderator of the congressional employment of the commerce power was the theme many years later in *Wickard*, for after the Court acknowledged the breadth of the *Gibbons* formulation it invoked Chief Justice Marshall yet again in adding that "[h]e made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than judicial processes." *Wickard*, 317 U. S., at 120 (citation omitted). Hence, "conflicts of economic interest . . . are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." *Id.*, at 129 (footnote omitted).

As with "conflicts of economic interest," so with supposed conflicts of sovereign political interests implicated by the Commerce Clause: the Constitution remits them to politics. The point can be put no more clearly than the Court put it the last time it repudiated the notion that some state activities categorically defied the commerce power as understood in accordance with generally accepted concepts. After confirming Madison's and Wilson's views with a recitation of the sources of state influence in the structure of the National Constitution, *Garcia*, 469 U. S., at 550–552, the Court disposed of the possibility of identifying "principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty," *id.*, at 548. It concluded that

> "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.*, at 552.

The *Garcia* Court's rejection of "judicially created limitations" in favor of the intended reliance on national politics was all the more powerful owing to the Court's explicit recognition that in the centuries since the framing the relative powers of the two sovereign systems have markedly changed. Nationwide economic integration is the norm, the national political power has been augmented by its vast revenues, and the power of the States has been drawn down by the Seventeenth Amendment, eliminating selection of senators by state legislature in favor of direct election.

The *Garcia* majority recognized that economic growth and the burgeoning of federal revenue have not amended the Constitution, which contains no circuit breaker to preclude the political consequences of these developments. Nor is there any justification for attempts to nullify the natural political impact of the particular amendment that was adopted. The significance for state political power of ending state legislative selection of senators was no secret in 1913, and the amendment was approved despite public comment on that very issue. Representative Franklin Bartlett, after quoting Madison's Federalist No. 62, as well as remarks by George Mason and John Dickinson during the Constitutional Convention, concluded, "It follows, therefore, that the framers of the Constitution, were they present in this House to-day, would inevitably regard this resolution as a most direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance." 26 Cong. Rec. 7774 (1894). Massachusetts Senator George Hoar likewise defended indirect election of the Senate as "a great security for the rights of the States." S. Doc. No. 232, 59th Cong., 1st Sess., 21 (1906). And Elihu Root warned that if the selection of senators should be taken from state legislatures, "the tide that now sets toward the Federal Government will swell in volume and power." 46 Cong. Rec. 2243 (1911). "The time will come," he continued, "when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States." *Ibid.* See generally Rossum, The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment, 36 San Diego L. Rev. 671, 712–714 (1999) (noting federalism-based objections to the Seventeenth Amendment). These warnings did not kill the proposal; the Amendment was ratified, and today it is only the ratification, not the predictions, which this Court can legitimately heed.[19]

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[19] The majority tries to deflect the objection that it blocks an intended political process by explaining that the Framers intended politics to set the federal balance only within the sphere of permissible commerce legislation, whereas we are looking to politics to define that sphere (in derogation even of *Marbury* v. *Madison*, 1 Cranch 137 (1803)), *ante*, at 616. But we all accept the view that politics is the arbiter of state interests only within the realm of legitimate congressional action under the commerce power. Neither Madison nor Wilson nor Marshall, nor the *Jones & Laughlin*, *Darby*, *Wickard*, or *Garcia* Courts, suggested that politics defines the commerce power. Nor do we, even though we recognize that the conditions of the contemporary world result in a vastly greater sphere

Amendments that alter the balance of power between the National and State Governments, like the Fourteenth, or that change the way the States are represented within the Federal Government, like the Seventeenth, are not rips in the fabric of the Framers' Constitution, inviting judicial repairs. The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power.

### C

The Court's choice to invoke considerations of traditional state regulation in these cases is especially odd in light of a distinction recognized in the now-repudiated opinion for the Court in *Usery.* In explaining that there was no inconsistency between declaring the States immune to the commerce power exercised in the Fair Labor Standards Act, but subject to it under the Economic Stabilization Act of 1970, as decided in *Fry* v. *United States,* 421 U. S. 542 (1975), the Court spoke of the latter statute as dealing with a serious threat affecting all the political components of the fed-

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of influence for politics than the Framers would have envisioned. Politics has legitimate authority, for all of us on both sides of the disagreement, only within the legitimate compass of the commerce power. The majority claims merely to be engaging in the judicial task of patrolling the outer boundaries of that congressional authority. See *ante,* at 616–617, n. 7. That assertion cannot be reconciled with our statements of the substantial effects test, which have not drawn the categorical distinctions the majority favors. See, *e. g., Wickard,* 317 U. S., at 125; *United States* v. *Darby,* 312 U. S. 100, 118–119 (1941). The majority's attempt to circumscribe the commerce power by defining it in terms of categorical exceptions can only be seen as a revival of similar efforts that led to near tragedy for the Court and incoherence for the law. If history's lessons are accepted as guides for Commerce Clause interpretation today, as we do accept them, then the subject matter of the Act falls within the commerce power and the choice to legislate nationally on that subject, or to except it from national legislation because the States have traditionally dealt with it, should be a political choice and only a political choice.

eral system, "which only collective action by the National Government might forestall." *Usery*, 426 U. S., at 853. Today's majority, however, finds no significance whatever in the state support for the Act based upon the States' acknowledged failure to deal adequately with gender-based violence in state courts, and the belief of their own law enforcement agencies that national action is essential.[20]

The National Association of Attorneys General supported the Act unanimously, see Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991), and Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy, representing that "the current system for dealing with violence against women is inadequate," see Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34–36 (1993). It was against this record of failure at the state level that the Act was passed to provide the choice of a federal forum in place of the state-court systems found inadequate to stop gender-biased violence. See Women and Violence, Hearing before the Senate Committee on the Judiciary, 101st Cong., 2d Sess., 2 (1990) (statement of Sen. Biden) (noting importance of federal forum).[21] The Act accordingly offers a federal civil rights remedy aimed exactly at violence against women, as an alternative to the generic state tort causes of action found to be poor tools of action by the state task forces. See S. Rep. No. 101–545, at 45 (noting difficulty of fitting gender-motivated crimes into common-law categories). As the 1993 Senate Report put it, "The Violence Against Women Act is intended to respond both to the underlying attitude that this violence is somehow less serious than other crime and to the resulting failure of our criminal justice system to address such violence. Its goals are both symbolic and practical . . . ." S. Rep. No. 103–138, at 38.

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[20] See n. 7, *supra*. The point here is not that I take the position that the States are incapable of dealing adequately with domestic violence if their political leaders have the will to do so; it is simply that the Congress had evidence from which it could find a national statute necessary, so that its passage obviously survives Commerce Clause scrutiny.

[21] The majority's concerns about accountability strike me as entirely misplaced. Individuals, such as the defendants in this action, haled into federal court and sued under the United States Code, are quite aware of which of our dual sovereignties is attempting to regulate their behavior. Had Congress chosen, in the exercise of its powers under § 5 of the Fourteenth Amendment, to proceed instead by regulating the States, rather than private individuals, this accountability would be far less plain.

The collective opinion of state officials that the Act was needed continues virtually unchanged, and when the Civil Rights Remedy was challenged in court, the States came to its defense. Thirty-six of them and the Commonwealth of Puerto Rico have filed an *amicus* brief in support of petitioners in these cases, and only one State has taken respondents' side. It is, then, not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not. For with the Court's decision today, Antonio Morrison, like *Carter Coal*'s James Carter before him, has "won the states' rights plea against the states themselves." R. Jackson, The Struggle for Judicial Supremacy 160 (1941).

## III

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of *Carter Coal*, *Schechter*, and *Usery* once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup* v. *New York*, 386 U. S. 767 (1967) *(per curiam)*, and *Miller* v. *California*, 413 U. S. 15 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. See *id.*, at 22, n. 3; *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 706–708 (1968) (Harlan, J., dissenting). As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." O. Holmes, The Common Law 167 (Howe ed. 1963). The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, and with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Part I–A, dissenting.

No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home. The question is how the judiciary can best implement that original federalist understanding where the Commerce Clause is at issue.

## I

The majority holds that the federal commerce power does not extend to such "noneconomic" activities as "noneconomic, violent criminal conduct" that significantly affects interstate commerce only if we "aggregate" the interstate "effect[s]" of individual instances. *Ante,* at 617. JUSTICE SOUTER explains why history, precedent, and legal logic militate against the majority's approach. I agree and join his opinion. I add that the majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone—a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

### A

Consider the problems. The "economic/noneconomic" distinction is not easy to apply. Does the local street corner mugger engage in "economic" activity or "noneconomic" activity when he mugs for money? See *Perez* v. *United States,* 402 U. S. 146 (1971) (aggregating local "loan sharking" instances); *United States* v. *Lopez,* 514 U. S. 549, 559 (1995) (loan sharking is economic because it consists of "intrastate extortionate credit transactions"); *ante,* at 610. Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute? See United States General Accounting Office, Health, Education, and Human Services Division, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 7–8 (Nov. 1998); Brief for Equal Rights Advocates et al. as *Amicus Curiae* 10–12.

The line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, "noneconomic" activity taking place at economic establishments. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) (upholding civil rights laws forbidding discrimination at local motels); *Katzenbach* v. *McClung*, 379 U. S. 294 (1964) (same for restaurants); *Lopez, supra*, at 559 (recognizing congressional power to aggregate, hence forbid, noneconomically motivated discrimination at public accommodations); *ante*, at 610 (same). And it would permit Congress to regulate where that regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez, supra*, at 561; cf. Controlled Substances Act, 21 U. S. C. §801 *et seq.* (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law by including it, or much of it, in a broader "Safe Transport" or "Workplace Safety" act?

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause?* If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce . . . among the several States," and to make laws "necessary and proper" to implement that power. Art. I, §8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause.

This Court has long held that only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38–39 (1937) (focusing upon interstate effects); *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942) (aggregating interstate effects of wheat grown for home consumption); *Heart of Atlanta Motel, supra,* at 258 ("'[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze'" (quoting *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (1949))). Nothing in the Constitution's language, or that of earlier cases prior to *Lopez,* explains why the Court should ignore one highly relevant characteristic of an interstate-commerce-affecting cause (how "local" it is), while placing critical constitutional weight upon a different, less obviously relevant, feature (how "economic" it is).

Most importantly, the Court's complex rules seem unlikely to help secure the very object that they seek, namely, the protection of "areas of traditional state regulation" from federal intrusion. *Ante,* at 615. The Court's rules, even if broadly interpreted, are underinclusive. The local pickpocket is no less a traditional subject of state regulation than is the local gender-motivated assault. Regardless, the Court reaffirms, as it should, Congress' well-established and frequently exercised power to enact laws that satisfy a commerce-related jurisdictional prerequisite—for example, that some item relevant to the federally regulated activity has at some time crossed a state line. *Ante,* at 609, 611–612, 613, and n. 5; *Lopez, supra,* at 558; *Heart of Atlanta Motel, supra,* at 256 ("'[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question'" (quoting *Caminetti* v. *United States,* 242 U. S. 470, 491 (1917))); see also *United States* v. *Bass,* 404 U. S. 336, 347–350 (1971) (saving ambiguous felon-in-possession statute by requiring gun to have crossed state line); *Scarborough* v. *United States,* 431 U. S. 563, 575 (1977) (interpreting same statute to require only that gun passed "in interstate commerce" "at some time," without questioning constitutionality); cf., *e. g.,* 18 U. S. C. § 2261(a)(1) (making it a federal crime for a person to cross state lines to commit a crime of violence against a spouse or intimate partner); § 1951(a) (federal crime to commit robbery, extortion, physical violence or threat thereof, where "article or commodity in commerce" is affected, obstructed, or delayed); § 2315 (making unlawful the knowing receipt or possession of certain stolen items that have "crossed a State . . . boundary"); § 922(g)(1) (prohibiting felons from shipping, transporting, receiving, or possessing firearms "in interstate . . . commerce").

And in a world where most everyday products or their component parts cross interstate boundaries, Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. See, *e. g.*, Child Support Recovery Act of 1992, 18 U. S. C. § 228. Although this possibility does not give the Federal Government the power to regulate everything, it means that any substantive limitation will apply randomly in terms of the interests the majority seeks to protect. How much would be gained, for example, were Congress to reenact the present law in the form of "An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce"? Complex Commerce Clause rules creating fine distinctions that achieve only random results do little to further the important federalist interests that called them into being. That is why modern (pre-*Lopez*) case law rejected them. See *Wickard, supra,* at 120; *United States* v. *Darby,* 312 U. S. 100, 116–117 (1941); *Jones & Laughlin Steel Corp., supra,* at 37.

The majority, aware of these difficulties, is nonetheless concerned with what it sees as an important contrary consideration. To determine the lawfulness of statutes simply by asking whether Congress could reasonably have found that *aggregated* local instances significantly affect interstate commerce will allow Congress to regulate almost anything.

Virtually all local activity, when instances are aggregated, can have "substantial effects on employment, production, transit, or consumption." Hence Congress could "regulate any crime," and perhaps "marriage, divorce, and childrearing" as well, obliterating the "Constitution's distinction between national and local authority." *Ante,* at 615, 616; *Lopez,* 514 U. S., at 558; cf. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 548 (1935) (need for distinction between "direct" and "indirect" effects lest there "be virtually no limit to the federal power"); *Hammer* v. *Dagenhart,* 247 U. S. 251, 276 (1918) (similar observation).

This consideration, however, while serious, does not reflect a jurisprudential defect, so much as it reflects a practical reality. We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate. *Heart of Atlanta Motel,* 379 U. S., at 251. And that fact makes it close to impossible for courts to develop meaningful subject-matter categories that would exclude some kinds of local activities from ordinary Commerce Clause "aggregation" rules without, at the same time, depriving Congress of the power to regulate activities that have a genuine and important effect upon interstate commerce.

Since judges cannot change the world, the "defect" means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance. *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528, 552 (1985); *ante,* at 645–649 (SOUTER, J., dissenting); *Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62, 93–94 (2000) (STEVENS, J., dissenting) (Framers designed important structural safeguards to ensure that, when Congress legislates, "the normal operation of the legislative process itself would adequately defend state interests from undue infringement"); see also Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000) (focusing on role of political process and political parties in protecting state interests). Congress is institutionally motivated to do so. Its Members represent state and local district interests. They consider the views of state and local officials when they legislate, and they have even developed formal procedures to ensure that such consideration takes place. See, *e. g.*, Unfunded Mandates Reform Act of 1995, Pub. L. 104–4, 109 Stat. 48 (codified in scattered sections of 2 U. S. C.). Moreover, Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the Judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories. See, *e. g.*, 42 U. S. C. § 7543(b) (Clean Air Act); 33 U. S. C. § 1251 *et seq.* (Clean Water Act); see also *New York* v. *United States*, 505 U. S. 144, 167–168 (1992) (collecting other examples of "cooperative federalism"). Not surprisingly, the bulk of American law is still state law, and overwhelmingly so.

## B

I would also note that Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an "are[a] of traditional state regulation." *Ante,* at 615. And in response, attorneys general in the overwhelming majority of States (38) supported congressional legislation, telling Congress that "[o]ur experience as Attorneys General strengthens our belief that the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds." Crimes of Violence Motivated by Gender, Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 103d Cong., 1st Sess., 34–36 (1993); see also Violence Against Women: Victims of the System, Hearing on S. 15 before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 37–38 (1991) (unanimous resolution of the National Association of Attorneys General); but cf. Crimes of Violence Motivated by Gender, *supra*, at 77–84 (Conference of Chief Justices opposing legislation).

Moreover, as JUSTICE SOUTER has pointed out, Congress compiled a "mountain of data" explicitly documenting the interstate commercial effects of gender-motivated crimes of violence. *Ante*, at 628–635, 653–654 (dissenting opinion). After considering alternatives, it focused the federal law upon documented deficiencies in state legal systems. And it tailored the law to prevent its use in certain areas of traditional state concern, such as divorce, alimony, or child custody. 42 U. S. C. § 13981(e)(4). Consequently, the law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem. Cf. §§ 300w–10, 3796gg, 3796hh, 10409, 13931 (providing federal moneys to encourage state and local initiatives to combat gender-motivated violence).

I call attention to the legislative process leading up to enactment of this statute because, as the majority recognizes, *ante*, at 614, it far surpasses that which led to the enactment of the statute we considered in *Lopez*. And even were I to accept *Lopez* as an accurate statement of the law, which I do not, that distinction provides a possible basis for upholding the law here. This Court on occasion has pointed to the importance of procedural limitations in keeping the power of Congress in check. See *Garcia*, *supra*, at 554 ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy'" (quoting *EEOC* v. *Wyoming*, 460 U. S. 226, 236 (1983))); see also *Gregory* v. *Ashcroft*, 501 U. S. 452, 460–461 (1991) (insisting upon a "plain statement" of congressional intent when Congress legislates "in areas traditionally regulated by the States"); cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 103–105, 114–117 (1976); *Fullilove* v. *Klutznick*, 448 U. S. 448, 548–554 (1980) (STEVENS, J., dissenting).

Commentators also have suggested that the thoroughness of legislative procedures—*e. g.*, whether Congress took a "hard look"—might sometimes make a determinative difference in a Commerce Clause case, say, when Congress legislates in an area of traditional state regulation. See, *e. g.*, Jackson, Federalism and the Uses and Limits of Law: *Printz* and Principle?, 111 Harv. L. Rev. 2180, 2231–2245 (1998); Gardbaum, Rethinking Constitutional Federalism, 74 Texas L. Rev. 795, 812–828, 830–832 (1996); Lessig, Translating Federalism: *United States* v. *Lopez*, 1995 S. Ct. Rev. 125, 194–214 (1995); see also Treaty Establishing the European Community Art. 5; Bermann, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, 94 Colum. L. Rev. 331, 378–403 (1994) (arguing for similar limitation in respect to somewhat analogous principle of subsidiarity for European Community); Gardbaum, *supra*, at 833–837 (applying subsidiarity principles to American federalism). Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority's approach. See *supra*, at 656–659.

I continue to agree with JUSTICE SOUTER that the Court's traditional "rational basis" approach is sufficient. *Ante*, at 628 (dissenting opinion); see also *Lopez*, 514 U. S., at 603–615 (SOUTER, J., dissenting); *id.*, at 615–631 (BREYER, J., dissenting). But I recognize that the law in this area is unstable and that time and experience may demonstrate both the unworkability of the majority's rules and the superiority of Congress' own procedural approach—in which case the law may evolve toward a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.

For these reasons, as well as those set forth by JUSTICE SOUTER, this statute falls well within Congress' Commerce Clause authority, and I dissent from the Court's contrary conclusion.

## II

Given my conclusion on the Commerce Clause question, I need not consider Congress' authority under § 5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority. The Court points out that in *United States* v. *Harris*, 106 U. S. 629 (1883), and the *Civil Rights Cases*, 109 U. S. 3 (1883), the Court held that § 5 does not authorize Congress to use the Fourteenth Amendment as a source of power to remedy the conduct of *private persons*. *Ante*, at 621–622. That is certainly so. The Federal Government's argument, however, is that Congress used § 5 to remedy the actions of *state actors*, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence—a failure that the States, and Congress, documented in depth. See *ante*, at 630–631, n. 7, 653–654 (SOUTER, J., dissenting) (collecting sources).

Neither *Harris* nor the *Civil Rights Cases* considered this kind of claim. The Court in *Harris* specifically said that it treated the federal laws in question as "directed *exclusively* against the action of private persons, without reference to the laws of the State or their administration by her officers." 106 U. S., at 640 (emphasis added); see also *Civil Rights Cases*, *supra*, at 14 (observing that the statute did "not profess to be corrective of any constitutional wrong committed by the States" and that it established "rules for the conduct of individuals in society towards each other, . . . without referring in any manner to any supposed action of the State or its authorities").

The Court responds directly to the relevant "state actor" claim by finding that the present law lacks "'congruence and proportionality'" to the state discrimination that it purports to remedy. *Ante*, at 625–626; see *City of Boerne* v. *Flores*, 521 U. S. 507, 526 (1997). That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated in jury selection, *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); *Ex parte Virginia*, 100 U. S. 339 (1880), is not "directed . . . at any State or state actor." *Ante*, at 626.

But why can Congress not provide a remedy against private actors? Those private actors, of course, did not themselves violate the Constitution. But this Court has held that Congress at least sometimes can enact remedial "[l]egislation . . . [that] prohibits conduct which is not itself unconstitutional." *Flores*, *supra*, at 518; see also *Katzenbach* v. *Morgan*, *supra*, at 651; *South Carolina* v. *Katzenbach*, *supra*, at 308. The statutory remedy does not in any sense purport to "determine what constitutes a constitutional violation." *Flores*, *supra*, at 519. It intrudes little upon either States or private parties. It may lead state actors to improve their own remedial systems, primarily through example. It restricts private actors only by imposing liability for private conduct that is, in the main, already forbidden by state law. Why is the remedy "disproportionate"? And given the relation between remedy and violation—the creation of a federal remedy to substitute for constitutionally inadequate state remedies—where is the lack of "congruence"?

The majority adds that Congress found that the problem of inadequacy of state remedies "does not exist in all States, or even most States." *Ante,* at 626. But Congress had before it the task force reports of at least 21 States documenting constitutional violations. And it made its own findings about pervasive gender-based stereotypes hampering many state legal systems, sometimes unconstitutionally so. See, *e. g.,* S. Rep. No. 103–138, pp. 38, 41–42, 44–47 (1993); S. Rep. No. 102–197, pp. 39, 44–49 (1991); H. R. Conf. Rep. No. 103–711, p. 385 (1994). The record nowhere reveals a congressional finding that the problem "does not exist" elsewhere. Why can Congress not take the evidence before it as evidence of a national problem? This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution. And the deference this Court gives to Congress' chosen remedy under § 5, *Flores, supra,* at 536, suggests that any such requirement would be inappropriate.

Despite my doubts about the majority's § 5 reasoning, I need not, and do not, answer the § 5 question, which I would leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us. And I would uphold its constitutionality as the "necessary and proper" exercise of legislative power granted to Congress by that Clause.

# FISCHER *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99–116. Argued February 22, 2000—Decided May 15, 2000

Petitioner, while president and part owner of Quality Medical Consultants, Inc. (QMC), negotiated a $1.2 million loan to QMC from West Volusia Hospital Authority (WVHA), a municipal agency responsible for operating two Florida hospitals, both of which participate in the federal Medicare program. In 1993 WVHA received between $10 and $15 million in Medicare funds. After a 1994 audit of WVHA raised questions about the QMC loan, petitioner was indicted for violations of the federal bribery statute, including defrauding an organization which receives benefits under a federal assistance program, 18 U. S. C. § 666(a)(1)(A), and paying a kickback to one of its agents, § 666(a)(2). A jury convicted him on all counts, and the District Court sentenced him to imprisonment, imposed a term of supervised release, and ordered the payment of restitution. On appeal petitioner argued that the Government failed to prove WVHA, as the organization affected by his wrongdoing, received "benefits in excess of $10,000 under a Federal program," as required by § 666(b). In rejecting that argument and affirming the convictions, the Eleventh Circuit held that funds received by an organization constitute "benefits" within § 666's meaning if the source of the funds is a federal program, like Medicare, which provides aid or assistance to participating organizations.

*Held:* Health care providers such as the one defrauded by petitioner receive "benefits" within the meaning of § 666(b). Pp. 671–682.

(a) Medicare's nature and purposes provide essential instruction in resolving this controversy. Medicare is a federally funded medical insurance program for the elderly and disabled. The Federal Government is the single largest source of funds for hospitals participating in Medicare. Such providers qualify to participate upon satisfying a comprehensive series of statutory and regulatory requirements, including licensing, quality assurance, staffing, and other standards. Compliance with these standards provides the Government with assurance that participating providers possess the capacity to fulfill their statutory obligation of providing "medically necessary" services "of a quality which meets professionally recognized standards of health care." 42 U. S. C. § 1320c–5(a). Medicare attains its objectives through an elaborate funding structure designed not only to compensate providers for the reasonable cost of the services actually rendered to patients, but also to enhance health care organizations' capacity to provide ongoing, quality services to the community at large. In the normal course Medicare disbursements occur periodically, often in advance of a provider's rendering services, in order to protect providers' liquidity and thereby assist in the ongoing provision of such services. The program, then, establishes correlating and reinforcing incentives: The Government has an interest in making available a high level of quality of care for the elderly and disabled; and providers, because of their financial dependence upon the program, have incentives to achieve program goals. Pp. 671–675.

(b) Medicare provider payments are "benefits," as that term is used in its ordinary sense and as it is intended in § 666(b). The Court rejects petitioner's argument that Medicare provides benefits only to the elderly and disabled, not to participating health care organizations. While standard definitions of the term "benefit" and provisions of Medicare support petitioner's assertion that qualifying patients rank as the program's primary beneficiaries, the fact that one beneficiary of an assistance program can be identified does not foreclose the existence of others. Section 666(b)'s language specifying that benefits can be in the form of "a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," coupled with § 666(a)'s broad substantive prohibitions, reveals Congress' unambiguous intent to ensure the integrity of organizations participating in federal assistance programs. In removing from the statute's coverage any "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business," § 666(c) does not exclude the payments here at issue from the meaning of "benefits" within § 666(b). Medicare payments are not simply compensation or reimbursement. The payments, in contrast, assist the hospital in making available and maintaining a certain level and quality of medical care in both its own interests and those of the greater community. The provider itself is the object of substantial Government regulation, and adequate payment and assistance to the provider is itself one of Medicare's objectives. Accordingly, the health care provider is receiving a benefit in the conventional sense of the term, unlike the case of a contractor whom the Government does not regulate or assist for long-term objectives or for purposes beyond performance of an immediate transaction. Pp. 675–681.

(c) The Court does not suggest that federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b). Adopting a broad, almost limitless use of the term "benefits" would upset the proper federal balance. The statutory inquiry should examine the conditions under which the federal payments are received. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program. The Government has a legitimate and significant interest in prohibiting financial fraud or bribery being perpetrated upon Medicare providers: Such acts threaten the program's integrity and raise the risk participating organizations will lack the resources needed to provide the requisite level and quality of care. Pp. 681–682.

168 F. 3d 1273, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 682.

*Mark L. Horwitz* argued the cause for petitioner. With him on the briefs were *Glen J. Ioffredo*, *Jeffrey T. Green*, and *Kristin G. Koehler*.

*Lisa Schiavo Blatt* argued the cause for the United States. With her on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, and *Deputy Solicitor General Dreeben*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The federal bribery statute prohibits defrauding organizations which "receiv[e], in any one year period, benefits in excess of $10,000 under a Federal program." 18 U. S. C. § 666(b). We granted certiorari to determine whether the statute covers fraud perpetrated on organizations participating in the Medicare program. Upon consideration of the role and regulated status of hospitals as health care providers under the Medicare program, we hold they receive "benefits" within the meaning of the statute. We affirm petitioner's convictions.

## I

Petitioner Jeffrey Allan Fischer was president and partial owner of Quality Medical Consultants, Inc. (QMC), a corpora-

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*[*] Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

tion which performed billing audits for health care organizations. In 1993 petitioner, on QMC's behalf, negotiated a $1.2 million loan from West Volusia Hospital Authority (WVHA), a municipal agency responsible for operating two hospitals located in West Volusia County, Florida. Both hospitals participate in the Medicare program, and in 1993 WVHA received between $10 and $15 million in Medicare funds.

A February 1994 audit of WVHA's financial affairs raised questions about the QMC loan. An investigation revealed QMC used the loan proceeds to repay creditors and to raise the salaries of its five owner-employees, including petitioner. It was determined that petitioner had arranged for QMC to advance at least $100,000 to a private company owned by an individual who had assisted QMC in securing a letter of credit in connection with the WVHA loan. QMC, at petitioner's directive, also committed portions of the loan proceeds to speculative securities. These investments yielded losses of almost $400,000. The investigation further uncovered use of the loan proceeds to pay, through an intermediate transfer, a $10,000 kickback to WVHA's chief financial officer, the individual with whom petitioner had negotiated the loan in the first instance. QMC defaulted on its obligation to WVHA and filed for bankruptcy.

In 1996 petitioner was indicted by a federal grand jury on 13 counts, including charges of defrauding an organization which receives benefits under a federal assistance program, 18 U. S. C. § 666(a)(1)(A), and of paying a kickback to one of its agents, § 666(a)(2). A jury convicted petitioner on all counts charged, and the District Court sentenced him to 65 months' imprisonment and a 3-year term of supervised release. Petitioner, in addition, was ordered to pay $1.2 million in restitution.

On appeal petitioner argued that the Government failed to prove WVHA, as the organization affected by his wrongdoing, received "benefits in excess of $10,000 under a Federal program," as required by 18 U. S. C. § 666(b). Rejecting the argument, the United States Court of Appeals for the Eleventh Circuit affirmed the convictions. 168 F. 3d 1273 (1999). It held that funds received by an organization constitute "benefits" within the meaning of § 666(b) if the source of the funds is a federal program, like Medicare, which provides aid or assistance to participating organizations. *Id.*, at 1276–1277. Entities receiving federal funding under ordinary commercial contracts, the court stated, fall outside the statute's coverage. *Ibid.* (citing and discussing *United States* v. *Copeland,* 143 F. 3d 1439 (CA11 1998) (holding that federal funds received under a contract to construct military aircraft did not constitute "benefits" within the meaning of § 666(b))). The court added that its construction furthered "the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs." 168 F. 3d, at 1277. It rejected the view that the Medicare program provides benefits only to its "targeted recipients," the qualifying patients. *Id.*, at 1278 (disagreeing with *United States* v. *LaHue,* 998 F. Supp. 1182 (Kan. 1998), aff'd, 170 F. 3d 1026 (CA10 1999)).

We granted certiorari, 528 U. S. 962 (1999), and we affirm.

## II

### A

The nature and purposes of the Medicare program give us essential instruction in resolving the present controversy. Established in 1965 as part of the Social Security Act, 42 U. S. C. § 1395 *et seq.* (1994 ed. and Supp. III), Medicare is a federally funded medical insurance program for the elderly and disabled. In fiscal 1997 some 38.8 million individuals were enrolled in the program, and over 6,100 hospitals were authorized to provide services to them. U. S. Dept. of Health and Human Services, Health Care Financing Administration, 1998 Data Compendium 45, 75 (Aug. 1998). Medicare expenditures for hospital services exceeded $123 billion in 1998, making the Federal Government the single largest source of funds for participating hospitals. See Cowen et al., National Health Expenditures, 1998, 21 Health Care Financing Review 165, 208 (Winter 1999) (Table 11). This amount constituted 32% of the hospitals' total receipts. *Ibid.*

Providers of health care services, such as the two hospitals operated by WVHA, qualify to participate in the program upon satisfying a comprehensive series of statutory and regulatory requirements, including particular accreditation standards. Hospitals, for instance, must satisfy licensing standards, 42 CFR § 482.11 (1999); possess a governing body to "ensure that there is an effective, hospital-wide quality assurance program to evaluate the provision of patient care," § 482.21; and employ a "well organized" medical staff accountable on matters relating to "the quality of the medical care provided to patients," § 482.22(b). Medicare's implementing regulations also require hospitals, among many other standards, to maintain and provide 24-hour nursing services, § 482.23; complete medical record services, § 482.24; "pharmaceutical services that meet the needs of the patients," § 482.25; and organized dietary services staffed with qualified personnel, § 482.28. The regulations go further, requiring hospital facilities to "be constructed, arranged, and maintained to ensure the safety of the patient, and to provide facilities for diagnosis and treatment and for special hospital services appropriate to the needs of the community." § 482.41. Compliance with these standards provides the Government with assurance that participating providers possess the capacity to fulfill their statutory obligation of providing "medically necessary" services "of a quality which meets professionally recognized standards of health care." 42 U. S. C. § 1320c–5(a). Peer review organizations monitor providers' compliance with these and other obligations. § 1320c–3(a); 42 CFR § 466.71 (1999). Sanctions for noncompliance include dismissal from the program. 42 U. S. C. § 1320c–5(b)(1).

Medicare attains its objectives through an elaborate funding structure. Participating health care organizations, in exchange for rendering services, receive federal funds on a periodic basis. §§ 1395g, 1395*l*. The amounts received reflect the "reasonable cost" of services rendered, defined as "the costs necessary in the efficient delivery of needed health services to individuals covered [by the program]." § 1395x(v)(1)(A). Necessary costs are not limited to the immediate costs of an individual treatment procedure. Instead they are defined in broader terms: "Necessary and proper costs are costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities." 42 CFR § 413.9(b)(2) (1999). Allowable costs include amounts which enhance the organization's capacity to provide ongoing, quality services not only to eligible patients but also to the community at large. By way of example, amounts incurred for "certain educational programs for interns and residents, known as [graduate medical education] programs, are 'allowable cost[s]' for which a hospital (a provider) may receive reimbursement." *Regions Hospital* v. *Shalala,* 522 U. S. 448, 452 (1998) (citing 42 CFR § 413.85(a) (1996)); see also § 413.85(b) (1999); *Thomas Jefferson Univ.* v. *Shalala,* 512 U. S. 504, 507–508 (1994) (describing regulation of education programs). "These programs," the Medicare regulations explain, "contribute to the quality of patient care within an institution and are necessary to meet the community's needs for medical and paramedical personnel. . . . [M]any communities have not assumed responsibility for financing these programs and it is necessary that support be provided by those purchasing healthcare. Until communities undertake to bear these costs, the program will participate appropriately in the support of these activities." 42 CFR § 413.85(c) (1999). Medicare also permits, indeed encourages, these providers to deposit the amounts of reimbursements received for depreciation costs and other cash into sinking funds called "funded depreciation accounts." § 413.134(e). Investment income earned on these funds does not operate to reduce a provider's interest expense, § 413.153(b)(2)(iii), creating incentives to maintain modern medical equipment and facilities.

The Medicare regulations, furthermore, afford certain provider organizations "special treatment," intended to ensure the ongoing availability of medical services for qualifying patients. See 42 CFR pt. 412G (1999). Providers qualifying as "Medicare-dependent, small rural hospital[s]," for instance, are entitled to additional, "lump sum" payments to compensate for significant declines in demand for patient care. § 412.108. The additional funds enable a provider to "maintai[n] [its] necessary core staff and services" and to satisfy its "fixed (and semi-fixed) costs." §§ 412.108(d)(3)(A), (B). So too does the Medicare program authorize "special treatment" for, among other providers, "sole community hospitals," "renal transplantation centers," and "hospitals that serve a disproportionate share of low-income patients." See §§ 412.92, 412.100, 412.106. The subsidies assist providers in satisfying those financial obligations necessary to continue as going concerns in accordance with the program's requirements. See, *e. g.*, § 412.92(d)(2).

In the normal course Medicare disbursements occur on a periodic basis, often in advance of a provider's rendering services, 42 U. S. C. § 1395g(a); 42 CFR §§ 413.60, 413.64 (1999). The payment system serves to "protect providers' liquidity," *Good Samaritan Hospital* v. *Shalala*, 508 U. S. 402, 406 (1993), thereby assisting in the ongoing provision of services. 42 CFR § 413.5(b)(1) (1999) (requiring reimbursement method to "result in current payment so that institutions will not be disadvantaged, as they sometimes are under other arrangements, by having to put up money for the purchase of goods and services well before they receive reimbursement"); § 413.5(b)(6) (reimbursement system must operate under "recognition of the need of hospitals and other providers to keep pace with growing needs and to make improvements"). The program, then, establishes correlating and reinforcing incentives: The Government has an interest in making available a high level of quality of care for the elderly and disabled; and providers, because of their financial dependence upon the program, have incentives to achieve program goals. The nature of the program bears on the question of statutory coverage.

## B

Section 666 of Title 18 of the United States Code prohibits acts of theft and fraud against organizations receiving funds under federal assistance programs. The statute in relevant part provides as follows:

> "(a) Whoever, if the circumstance described in subsection (b) of this section exists—
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> "(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> "(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
>
> "(i) is valued at $5,000 or more, and
>
> "(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or
>
> "(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or
>
> "(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or re-

> ward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> "shall be fined under this title, imprisoned not more than 10 years, or both.
>
> "(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.
>
> "(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business."

Liability for the acts prohibited by subsection (a) is predicated upon a showing that the defrauded organization "receive[d], in any one period, benefits in excess of $10,000 under a Federal program." § 666(b). Those benefits can be in the form of "a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." *Ibid.* All agree Medicare is a federal assistance program, see 42 CFR § 400.200 (1999), and that WVHA, as the organization defrauded by petitioner's actions, received in excess of $10,000 in payments under the program. The sole point in contention is whether those payments constituted "benefits" within the meaning of subsection (b).

Petitioner argues that the Medicare program provides benefits to the elderly and disabled but not to the health care organizations. Provider organizations, in petitioner's view, do no more than render services in exchange for compensation. Under petitioner's submission the Medicare program envisions a single beneficiary, the qualifying patient. The Government, in opposition, urges that a determination whether an organization receives "benefits" within the meaning of § 666(b) turns on whether the Federal Government was the source of the payment. Funds received under a federal assistance program, the Government asserts, can be traced from federal coffers, often through an intermediary or carrier, to the health care provider. Under its view, the "federal-program source of the funds" satisfies the benefits definition. Brief for United States 11.

We reject petitioner's reading of the statute but without endorsing the Government's broader position. We conclude Medicare payments are "benefits," as the term is used in its ordinary sense and as it is intended in the statute. The noun "benefit" means "something that guards, aids, or promotes well-being: advantage, good"; "useful aid"; "payment, gift [such as] financial help in time of sickness, old age, or unemployment"; or "a cash payment or service provided for under an annuity, pension plan, or insurance policy." Webster's Third New International Dictionary 204 (1971). These definitions support petitioner's assertion that qualifying patients receive benefits under the Medicare program. It is commonplace for individuals to refer to their retirement or health plans as "benefits." So it ought not to be disputed that the elderly and disabled rank as the primary beneficiaries of the Medicare program. See 42 U. S. C. §§ 1395c, 1395j; 42 CFR § 400.202 (1999) (defining "beneficiary" as the "person who is entitled to Medicare benefits"); *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 91 (1995) ("Under the Medicare reimbursement scheme . . . participating hospitals furnish services to program beneficiaries and are reimbursed by the Secretary through fiscal intermediaries"); *Good Samaritan Hospital*, 508 U. S., at 404 (same).

That one beneficiary of an assistance program can be identified does not foreclose the existence of others, however. In this respect petitioner's construction would give incomplete meaning to the term "benefits." Medicare operates with a purpose and design above and beyond point-of-sale patient care, and it follows that the benefits of the program extend in a broader manner as well. The argument limiting the term "benefits" to the program's targeted or primary beneficiaries would exclude, for example, a Medicare intermediary (such as Blue Cross and Blue Shield), a result both parties disavow. For present purposes it cannot be disputed the providers themselves derive significant advantage by satisfying the participation standards imposed by the Government. These advantages constitute benefits within the meaning of the federal bribery statute, a statute we have described as "expansive," "both as to the [conduct] forbidden and the entities covered." *Salinas* v. *United States,* 522 U. S. 52, 56 (1997).

Subsection (b) identifies several sources as providing benefits under a federal program—"a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U. S. C. § 666(b). This language indicates that Congress viewed many federal assistance programs as providing benefits to participating organizations. Coupled with the broad substantive prohibitions of subsection (a), the language of subsection (b) reveals Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs.

Subsection (c) of the statute bears on the analysis. The provision removes from the statute's coverage any "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." § 666(c). Petitioner argues that the subsection operates to exclude the payments in question because they are either "compensation" or "expenses paid or reimbursed," or some combination of the two, and that the payments are made in the "usual course of business." We disagree.

The subsection provides that the specified sorts of payments are not ones to which the section applies. One inference from this formulation is that the described payments would have been benefits but for the subsection (c) exemption. We need not go so far. Even assuming the examples of subsection (c) bear upon the definition of benefits, statutory examples of nonapplicability do not necessarily give rise to the inference that absent the enumeration the statute would otherwise apply. To define all subsection (c) payments as exempted benefits would go well beyond the ordinary meaning of the word. On the other hand, the statute is not written to say: "The term 'benefits' does not include bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." We must construe the term "benefits," then, in a manner consistent with Congress' intent not to reach the enumerated class of transactions. See S. Rep. No. 98–225, p. 370 (1984) ("[N]ot every Federal contract or disbursement of funds would be covered [under § 666]. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime").

We do not accept the view that the Medicare payments here in question are for the limited purposes of compensating providers or reimbursing them for ordinary course expenditures. The payments are made for significant and substantial reasons in addition to compensation or reimbursement, so that neither these terms nor the usual course of business conditions set forth in subsection (c) are met here. The payments in question have attributes and purposes well beyond those described in subsection (c). These attributes and purposes are consistent with the definition of "benefit." While the payments might have similarities to payments an insurer would remit to a hospital quite without regard to the Medicare program, the Government does not make the payment unless the hospital complies with its intricate regulatory scheme. The payments are made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community.

Here, as we have explained, the provider itself is the object of substantial Government regulation. Medicare is designed to the end that the Government receives not only reciprocal value from isolated transactions but also long-term advantages from the existence of a sound and effective health care system for the elderly and disabled. The Government enacted specific statutes and regulations to secure its own interests in promoting the well being and advantage of the health care provider, in addition to the patient who receives care. The health care provider is receiving a benefit in the conventional sense of the term, unlike the case of a contractor whom the Government does not regulate or assist for long-term objectives or for significant purposes beyond performance of an immediate transaction. Adequate payment and assistance to the health care provider is itself one of the objectives of the program. These purposes and effects suffice to make the payment a benefit within the meaning of the statute.

The structure and operation of the Medicare program reveal a comprehensive federal assistance enterprise aimed at ensuring the availability of quality health care for the broader community. Participating health care organizations, as our above discussion shows, must satisfy a series of qualification and accreditation requirements, standards aimed in part at ensuring the provision of a certain quality of care. See 42 CFR pt. 482 (1999). By reimbursing participating providers for a wide range of costs and expenses, including medical treatment costs, overhead costs, and education costs, Medicare's reimbursement system furthers this objective. This scheme is structured to ensure that providers possess the capacity to render, on an ongoing basis, medical care to the program's qualifying patients. The structure, moreover, proves untenable petitioner's assertion that Congress has no interest in the financial stability of providers once services are rendered to patients. Payments are made in a manner calculated to maintain provider stability. § 413.5(b); *Good Samaritan Hospital,* 508 U. S., at 406. Incentives are given for long-term improvements, such as capital costs and education. §§ 413.85, 413.134(e), 413.153(b)(2)(iii). Subsidies, defined as "special treatment," are awarded to certain providers. *Id.,* pt. 412G. In short, provider organizations play a vital role and maintain a high level of responsibility in carrying out the program's purposes. Medicare funds, in turn, provide benefits extending beyond isolated, point-of-sale treatment transactions. The funds health care organizations receive for participating in the Medicare program constitute "benefits" within the meaning of 18 U. S. C. § 666(b).

Our discussion should not be taken to suggest that federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b). Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance. To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program. Health care organizations participating in the Medicare program satisfy this standard.

The Government has a legitimate and significant interest in prohibiting financial fraud or acts of bribery being perpetrated upon Medicare providers. Fraudulent acts threaten the program's integrity. They raise the risk participating organizations will lack the resources requisite to provide the level and quality of care envisioned by the program. Cf. *Salinas,* 522 U. S., at 61 (stating that acceptance of bribes by an official of a jail housing federal prisoners pursuant to an agreement with the Government "was a threat to the integrity and proper operation of the federal program").

Other cases may present questions requiring further examination and elaboration of the term "benefits." Here it suffices to hold that health care providers such as the one defrauded by petitioner receive benefits within the meaning of the statute. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

In my view, the only persons who receive "benefits" under Medicare are the individual elderly and disabled Medicare patients, not the medical providers who serve them. Payments made by the Federal Government to a Medicare health care provider to reimburse the provider for the costs of services rendered, rather than to provide financial aid to the hospital, are not "benefits." I respectfully dissent.

## I

The jurisdictional provision of 18 U. S. C. § 666(b) requires that an "organization, government, or agency receiv[e], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." As the Court notes, an organization is not a beneficiary of a federal program merely because the organization receives federal funds. *Ante,* at 677, 681. Rather, as the Court admits, a "benefit" is something that "guards, aids, or promotes well-being"; "useful aid"; or a "payment, gift [as] financial help in time of sickness, old age, or unemployment." Webster's Third New International Dictionary 204 (1971).

Therefore, the Court acknowledges, an organization "receives . . . benefits" within the meaning of § 666(b) only if the federal funds are designed to guard, aid, or promote the well-being of the organization, to provide useful aid to the organization, or to give the organization financial help in time of trouble. In my view, payments made by the Federal Government to a Medicare health care provider as part of a market transaction are not "benefits."[1]

The statutory and regulatory scheme governing Medicare reimbursements leaves no doubt that hospitals do not receive "benefits" from the Federal Government within this meaning of the term, but merely receive payments for costs pursuant to a market transaction. Although the Medicare reimbursement scheme is quite complex, it suffices to point out a few critical components.[2]

Under the "reasonable cost" reimbursement provisions relied on by the Court, *ante*, at 673–675, the Federal Government reimburses providers for "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U. S. C. § 1395x(v)(1)(A). The Social Security Act that created Medicare instructed the Secretary of Health and Human Services to promulgate regulations establishing the methods of determining "reasonable costs" and specifically directed the Secretary to consider, among other things, reimbursement methods used by private insurers. *Ibid.* See also *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. 87, 91–92 (1995).

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[1] Even if I thought that, under a reading of § 666(b) standing alone, a market exchange of payment for services might amount to "benefits," § 666(c) would eliminate that doubt. Section 666(c) makes clear that "bona fide . . . expenses paid or reimbursed, in the usual course of business," are not covered by the statute. As discussed below, Medicare payments to health care providers are precisely this type of payment.

[2] In 1993, the year relevant to the instant case, Medicare consisted of two separate programs, Parts A and B. Part A provides insurance for certain elderly or disabled persons to cover the costs of inpatient hospital care, nursing facility care, home health services, and hospice care. See generally 42 U. S. C. §§ 1395c to 1395i–4. Part B is a voluntary program that provides supplemental benefits to elderly or disabled Medicare participants to cover the costs of, among other things, physician services, laboratory and diagnostic tests, ambulance services, and prescription drugs. See generally §§ 1395j to 1395w–4. The Government did not present evidence at petitioner's trial regarding which provisions of Medicare accounted for the payments made to the West Volusia Hospital Authority in 1993.

Under these regulations, the Federal Government reimburses medical providers based upon the lower of the provider's reasonable cost of furnishing these services to beneficiaries or the provider's customary charges for the services. 42 CFR § 413.1(b) (1999). The regulations are designed to provide reimbursement for the actual cost of providing care to elderly and disabled Medicare beneficiaries. See § 413.5(a) ("Thus, the application of this approach, with appropriate accounting support, will result in meeting actual costs of services to beneficiaries"). The regulations make clear that the Federal Government will reimburse hospitals only for the costs of providing medical care to Medicare patients, as opposed to nonbeneficiary patients. § 413.80(d) ("Under Medicare . . . costs of services provided for other than beneficiaries are not to be borne by the Medicare program"); § 413.9(a) ("All payments to providers of services must be based on the reasonable cost of services covered under Medicare and related to the care of beneficiaries"); § 413.9(c)(3) ("The determination of reasonable cost of services must be based on cost related to the care of Medicare beneficiaries").

Although these reimbursement provisions permit hospitals to recover capital costs, such as the cost of maintaining building facilities, § 413.9(c), the allowable reimbursement for these expenditures is only the amount reasonably attributable to Medicare patients as opposed to general maintenance of the facilities. See § 413.9(b) ("The objective is that under the methods of determining costs, the costs with respect to individuals covered by the program will not be borne by individuals not so covered, and the costs with respect to individuals not so covered will not be borne by the program").

The "prospective payment system" adopted by Congress in 1983 to increase efficiency and reduce costs operates somewhat differently from the "reasonable cost" provisions but is also designed to reimburse hospitals for the cost of providing care to Medicare beneficiaries. 42 U. S. C. § 1395ww; 42 CFR pt. 412 (1999). Under this system, the Medicare program pays hospitals a fixed price for each case based on the patient's diagnosis related grouping (DRG), which is assigned based on the patient's diagnosis, age, and sex, among other things. 42 U. S. C. § 1395ww(e); 24 CFR § 412.60 (1999). The DRG figure represents the average cost of treating patients within the DRG. 42 U. S. C. § 1395ww(d)(2); 49 Fed. Reg. 251 (1984). Significantly, because hospitals are paid fixed amounts based on the DRG, the hospital, like any other private contractor, bears the risk of higher costs. See Kinney, Making Hard Choices under the Medicare Prospective Payment System: One Administrative Model for Allocating Medical Resources under a Government Health Insurance Program, 19 Ind. L. Rev. 1151, 1151–1152 (1986).

Thus, the statute and regulations make clear that medical providers are entitled only to reimbursement for the actual or estimated cost of services rendered to Medicare patients and that individual elderly and disabled patients—not hospitals—are the beneficiaries of the Medicare program. Indeed, the Social Security Act explicitly says so. See 42 U. S. C. § 1395a(b)(5) (1994 ed., Supp. III) ("The term 'medicare beneficiary' means an *individual* who is entitled to benefits" (emphasis added)). The Act repeatedly refers to Medicare "benefits" as assistance provided to individual participants, rather than to medical providers. See, *e. g.*, § 1395a ("Any individual entitled to insurance benefits under this subchapter"); § 1395b–2 ("Such notice shall be mailed annually to individuals entitled to benefits under part A or part B of this subchapter and when an individual applies for benefits under part A of this subchapter or enrolls under part B of this subchapter"); § 1395b–4(a) ("health insurance coverage to individuals who are eligible to receive benefits under this subchapter"); § 1395b–4(b)(2)(A)(i) ("information that may assist individuals in obtaining benefits"). In contrast, the Act commonly refers to "payments" to providers of medical services. See, *e. g.*, § 1395g(a) ("no such payments shall be made to any provider unless it has furnished such information as the Secretary may request"); § 1395f(a) ("payment for services furnished an individual may be made only to providers of services"); § 1395n(a) (1994 ed. and Supp. III) ("payment for services . . . furnished an individual may be made only to providers of services which are eligible"). This terminology, and the Medicare regulations defining allowable costs, reflect the fact that Medicare is a program for providing "financial help" to individual elderly and disabled patients rather than to the health care providers who treat them. Medicare's provisions for reimbursing providers' costs do nothing more than establish a market exchange of payment for services, and so cannot be said to provide "benefits" within the meaning of 18 U. S. C. § 666(b).

## II

Although the statutory provisions and regulations cited above demonstrate that Medicare operates as a reimbursement scheme with respect to health care providers, and not as a means of providing them "useful aid" or "financial help," the Court finds in the statute and regulations evidence that health care providers are, along with the individual elderly and disabled patients, also target beneficiaries of the program. I think that the Court's reasoning is both unpersuasive and boundless; any funds flowing from a federal assistance program could be deemed "benefits" under the Court's rationale, notwithstanding the Court's concluding disclaimer of such a result. Thus, although the Court purports to reject the Government's argument that "benefits" means "funds that originate in a federal assistance program," the Court, in practice, adopts it.

## A

First, the Court describes Medicare's elaborate funding structure and notes that Medicare's reasonable cost recovery system allows recovery of certain capital costs and the costs of education and training. *Ante,* at 673–674. These provisions of Medicare do not establish that hospitals receive "benefits." To the contrary, the capital costs recoverable under those provisions of Medicare are the costs tied to the treatment of Medicare patients. See *supra,* at 684–685. In this sense, the cost provisions of Medicare expressly defeat any suggestion that they are meant to provide a "benefit" to the hospital. These provisions are not designed to provide financial assistance to the hospital; they are designed to ensure that Medicare beneficiaries receive quality medical care. And again, the Medicare program picks up only the portion of the costs attributable to the care of Medicare beneficiaries. 42 CFR §§ 413.50, 413.85 (1999). In fact, the Court does not grapple with the evidence that Medicare systematically *under*-compensates health care providers, evidence that would further undermine the notion that hospitals are receiving some form of financial assistance from the program. See Utz, Federalism in Health Care: Costs and Benefits, 28 Conn. L. Rev. 127, 138–139 (1995).

Second, the Court relies on the numerous obligations imposed on health care providers participating in Medicare. *Ante,* at 672–675. The Court notes that health care providers must satisfy licensing standards, provide a laundry list of particular health care services, and ensure an effective quality-assurance program. I assume, however, that the same could be said of most Government contractors. The defense contractor who agrees to build the military's equipment is, no doubt, subject to an extensive list of statutory and regulatory requirements, not because the Government intends to provide "benefits" to the contractor, but because the Federal Government intends to place controls on the expenditure of federal dollars. See *United States* v. *Copeland*, 143 F. 3d 1439, 1442 (CA11 1998) (discussing regulatory burdens on defense contractors). Similarly, private insurers no doubt impose various requirements on those who receive reimbursements from them. In requiring hospitals to meet certain standards, the Federal Government is no different from these private insurers, except that the Federal Government exercises vastly greater market power. In other words, the imposition on health care providers of an intricate regulatory scheme is irrelevant to the question whether funds paid pursuant to that scheme are benefits.

Third, the Court contends that some health care providers receive "special treatment" in the form of lump sum payments designed to ensure the providers' ability to satisfy financial obligations. *Ante*, at 674. This feature of Medicare is also insufficient to show that any "benefits" were received by West Volusia Hospital Authority. These payments, which are part of the prospective payment system, see *supra*, at 685, are based on estimated costs of providing services to Medicare beneficiaries. See, *e. g.*, 42 CFR § 412.108 (1999). Like the standard reimbursement schemes outlined above, this payment system does not subsidize the hospital, it pays the hospital prospectively for performing a service.

Finally, the Court concludes, based on its observations of Medicare, that "Medicare operates with a purpose and design above and beyond point-of-sale patient care," namely, "ensuring the availability of quality health care for the broader community." *Ante*, at 677, 680. According to the Court, Medicare guarantees that "providers possess the capacity to render, on an ongoing basis, medical care to the program's qualifying patients." *Ante*, at 680. In other words, Medicare exists to guarantee patients' access to quality medical care. Quality medical care is available only if medical providers remain financially viable. Medicare payments create demand for medical services and, therefore, provide "benefits" to health care providers. This syllogism, however, amounts to nothing more than the self-evident point that Medicare aims to ensure that the beneficiaries of the program—patients—are able to receive the program's intended benefits. It does not establish that Medicare exists to put hospitals on the dole.

In short, none of the components of Medicare cited by the Court establishes that benefits flow to hospitals. It is significant that, although the Court repeatedly invokes, mantra-like, its conclusion that Medicare exists for a purpose above and beyond reimbursing hospitals for treating Medicare patients, see, *e. g., ante,* at 677–678, 679, 680, 681, when the Court comes around to actually identifying this purpose, it can only state: "The structure and operation of the Medicare program reveal a comprehensive federal assistance enterprise aimed at ensuring the availability of quality health care for the broader community." *Ante,* at 680. The Court cannot bring itself to say, as it must, that Medicare exists for the *hospital.*[3]

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[3] And even if I were to accept that some provisions of Medicare—the special treatment provisions, for example—provide a benefit to health care providers, there is no evidence in the record that West Volusia Hospital Authority received any such payments. Without such evidence, the Court's reliance on special provisions to uphold petitioner's conviction is improper. Title 18 U. S. C. § 666(b) is, after all, a jurisdictional provision that allows federal prosecution only if the specific organization at issue received more than $10,000 in "benefits." The Court treats the provision as window dressing. It is not necessary, under the Court's view, to show that *this* organization received benefits. It is sufficient to show that some hospitals receive them.

This approach is particularly inappropriate because § 666(b), or some similar jurisdictional provision, is constitutionally required. Section 666 was adopted pursuant to Congress' spending power, Art. I, § 8, cl. 1. We have held that the spending power requires, at least, that the exercise of federal power be related "to the federal interest in particular national

### B

Although the Court disclaims the Government's argument that "benefits" means only funds provided under a federal assistance program, the Court, in practice, adopts it. The Court's expansive rationale could be applied to any federal assistance program that provides funds to any organization. This result is inconsistent with the plain meaning of the statute. If Congress had meant to apply § 666 to any organization that receives "funds" totaling more than $10,000 per annum, it would have said so. Cf. 18 U. S. C. § 665 ("Whoever, being . . . connected in any capacity with any agency or organization receiving financial assistance or any funds under [a certain federal program] knowingly enrolls an ineligible participant, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a financial assistance agreement or contract pursuant to such Act shall be [punished]"). Congress, for that matter, could have omitted the word "benefits" from the statute and provided simply that any organization that "receives, in any one year period, in excess of $10,000 under a Federal program involving a . . . form of federal assistance" is covered by the statute. That Congress did not do so suggests that the word "benefits" has a

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projects or programs." *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987) (internal quotation marks omitted). See *id.*, at 213 (O'CONNOR, J., dissenting). Arguably, if Congress attempted to criminalize acts of theft or bribery based solely on the fact that—in circumstances unrelated to the theft or bribery—the victim organization received federal funds as payment for a market transaction, this constitutional requirement would not be satisfied. Without a jurisdictional provision that would ensure that in *each* case the exercise of federal power is related to the federal interest in a federal program, § 666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would "upse[t] the proper federal balance." *Ante*, at 681. Cf. *United States* v. *Lopez*, 514 U. S. 549, 561 (1995) ("[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

meaning separate and apart from the words "under a Federal program involving a . . . form of federal assistance." I am doubtful that the Court's interpretation gives any meaning at all to the word "benefits" in § 666(b) because, under the Court's rationale, any organization that receives $10,000 under a federal program involving federal assistance receives "benefits" in such an amount.

This expansive construction of § 666(b) is, at the very least, inconsistent with the rule of lenity—which the Court does not discuss. This principle requires that, to the extent that there is any ambiguity in the term "benefits," we should resolve that ambiguity in favor of the defendant. See *United States* v. *Bass,* 404 U. S. 336, 347 (1971) ("In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite" (internal quotation marks omitted)).

### C

I doubt that there is any federal assistance program that does not provide "benefits" to organizations under the Court's expansive rationale, but will illustrate my point with just one example employed by two lower courts. See *United States* v. *Wyncoop,* 11 F. 3d 119, 123 (CA9 1993); *United States* v. *LaHue,* 998 F. Supp. 1182, 1187 (Kan. 1998), aff'd, 170 F. 3d 1026 (CA10 1999). Many grocery stores accept more than $10,000 per annum in food stamps distributed to individual beneficiaries as part of the Federal Food Stamp and Food Distribution Program. Like Medicare providers, stores participating in the Food Stamp Program are required to satisfy a comprehensive series of statutory and regulatory requirements. See 7 CFR pt. 278 (1999). For example, stores are qualified to participate only if they sell an adequate percentage of staple foods such as meat, cereal, and dairy products. § 278.1(b)(1). Stores must document an ability to attract food stamp business and demonstrate the business integrity and reputation of the store owners and managers. §§278.1(b)(2)–(3). Like Medicare, the Food Stamp Program monitors the providers' compliance with the program's requirements. See §278.1(n). Like Medicare, the Food Stamp Program sanctions noncompliance with dismissal from the program. §278.1(l). And, the Food Stamp Program is like Medicare in that it can be described as having "a purpose and design above and beyond point-of-sale" of food. *Ante*, at 677. Undoubtedly, the Food Stamp Program helps to address the "grocery gap," that is, the lack of availability of reasonably priced nutritional foods in some low-income and rural areas. See Note, Food Stamp Trafficking: Why Small Groceries Need Judicial Protection from the Department of Agriculture (And from Their Own Employees), 96 Mich. L. Rev. 2156, 2176–2177 (1998); Department of Agriculture, Office of Analysis & Evaluation, Food Retailers in the Food Stamp Program: Characteristics and Service to Program Participants 15 (Feb. 1997) (Table 6). There is ample evidence on the face of the statute and regulations that Congress and the agency had in mind the need to ensure that low-income communities have access to grocery stores. See 7 U. S. C. §2021(a) (1994 ed., Supp. IV) (requiring the Secretary to consider hardship to the community in making disqualification determinations); 7 CFR §278.1(b)(1)(ii)(C) (1999) (listing availability of food stores in the community as a factor relevant to a firm's application to participate in the program). It could be said, therefore, that the grocery store's "own operations are one of the reasons for maintaining the program." *Ante*, at 681.

To my mind, the reason that a corner grocery does not receive "benefits" is simply that it merely receives payment from the Government in a market transaction. I fail to see, however, how the Court could reach the same conclusion that I would. Although the Court assures us that its holding today is narrow and factbound, depending on the "structure, operation, and purpose" of Medicare, *ibid.*, the consequences of the Court's reasoning are far reaching. In fact, the Court candidly acknowledges that its interpretation is expansive when it reads 18 U. S. C. § 666(b) to suggest that "Congress viewed *many* federal assistance programs as providing benefits to participating organizations." *Ante*, at 678 (emphasis added). In contrast, I think that the plain language of § 666(b) reflects a congressional intent to reach only those organizations that are *themselves* the beneficiaries of "useful aid" or "financial help in time of sickness, old age, or unemployment," rather than organizations that merely receive funds as part of a market transaction for goods or services.

* * *

For the foregoing reasons, I respectfully dissent.

# JOHNSON *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99–5153. Argued February 22, 2000—Decided May 15, 2000

The Sentencing Reform Act of 1984 replaced most forms of parole with supervised release overseen by the sentencing court. If release conditions are violated, that court may "revoke [the] release, and require the person to serve in prison all or part of the [supervised release] term . . . without credit for time previously served on postrelease supervision . . . ." 18 U. S. C. § 3583(e)(3). In March 1994, the District Court sentenced petitioner Johnson to imprisonment followed by a term of supervised release. After beginning supervised release in 1995, Johnson violated two conditions of his release. The District Court revoked his release and ordered him to serve an 18-month prison term to be followed by an additional 12 months of supervised release. The court cited no authority for ordering additional supervised release, but, under Circuit law, it might have relied on 18 U. S. C. § 3583(h), a subsection added to the statute in 1994, which explicitly gave district courts that power. Johnson appealed, arguing that § 3583(e)(3) did not give the district courts power to order a new supervised release term following reimprisonment, and that applying § 3583(h) to him violated the *Ex Post Facto* Clause. Although the Sixth Circuit had previously taken the same position as Johnson with regard to § 3583(e)(3), it affirmed his sentence, reasoning that § 3583(h)'s application was not retroactive because revocation of supervised release was punishment for Johnson's violation of his release conditions, which occurred after the 1994 amendments.

*Held:*

1. Section 3583(h) does not apply retroactively, so no *ex post facto* issue arises in this case. To prevail on his *ex post facto* claim, Johnson must show, *inter alia,* that the law operates retroactively. Contrary to the Sixth Circuit's reasoning, postrevocation penalties are attributable to the original conviction, not to defendants' new offenses for violating their supervised release conditions. Thus, to sentence Johnson under § 3583(h) would be to apply that section retroactively. However, absent a clear statement of congressional intent, § 3583(h) applies only to cases in which the initial offense occurred after the amendment's effective date, September 13, 1994. The Government offers nothing indicating a contrary intent. The decision to alter § 3583(e)(3)'s supervised release

rule does not reveal when or how that legislative decision was intended to take effect; and the omission of an express effective date simply indicates that, absent clear congressional direction, it takes effect on its enactment date, *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 404. Nor did Congress expressly identify the relevant conduct in a way that would point to retroactive intent. Thus, this case turns not on an *ex post facto* question, but on whether § 3583(e)(3) permitted imposition of supervised release following a recommitment. Pp. 699–703.

2. Section 3583(e)(3), at the time of Johnson's conviction, gave the District Court the authority to reimpose supervised release. Subsection (e)(3) does not speak directly to this question. And if the Court were to concentrate exclusively on the verb "revoke," it would not detect any suggestion that reincarceration might be followed by another supervised release term, for the conventional understanding of "revoke" is to annul by recalling or taking back. However, there are textual reasons to think that the option of further supervised release was intended. Subsection (e)(1) unequivocally "terminate[s]" a supervised release term without the possibility of its reimposition or continuation at a later time. Had Congress likewise meant subsection (3) to conclude any possibility of supervised release later, it would have been natural for Congress to write in like terms. That it chose "revoke" rather than "terminate" left the door open to a reading of subsection (3) that would not preclude further supervised release. The pre-1994 version of subsection (3) provided that a court could revoke a term of supervised release and require the person to serve in prison all or part of the "term of supervised release." This indicates that a revoked supervised release term continues to have some effect. If it could be served in prison, then the balance of it should remain effective when the reincarceration is over. This interpretation means that Congress used "revoke" in an unconventional way. However, the unconventional sense is not unheard of, for "revoke" can also mean to call or summon back without the implication of annulment. There is nothing surprising about the consequences of this reading. It also serves the congressional policy of providing for supervised release after incarceration in order to improve the odds of a successful transition from prison to liberty, and no prisoner would seem to need it more than one who has tried liberty and failed. This reading is also supported by pre-Sentencing-Guidelines parole practice. Congress repeatedly used "revoke" in providing for the consequences of parole violations, and there seems never to have been a question that a new parole term could follow a prison sentence imposed after revocation of an initial parole term. Since parole revocation followed by reincarceration was not a mere termination of a limited liberty that a defendant could experience only once per conviction, it is fair to suppose that,

absent some textual bar, revocation of parole's replacement, supervised release, was meant to leave open the possibility of further supervised release, as well. "Revoke" is no such bar, and the Court finds no other. Pp. 703–713.

181 F. 3d 105, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined, and in which KENNEDY, J., joined in part. KENNEDY, J., filed an opinion concurring in part, *post*, p. 713. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 715. SCALIA, J., filed a dissenting opinion, *post*, p. 715.

*Rita C. LaLumia* argued the cause for petitioner. With her on the briefs were *Leah J. Prewitt, David F. Ness, Jeffrey T. Green,* and *Joseph S. Miller.*

*Paul R. Q. Wolfson* argued the cause for the United States. With him on the brief were *Solicitor General Waxman, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben,* and *Richard A. Friedman.**

JUSTICE SOUTER delivered the opinion of the Court.

The issue in this case grows out of an *Ex Post Facto* Clause challenge to the retroactive application of 18 U. S. C. § 3583(h), which authorizes a district court to impose an additional term of supervised release following the reimprisonment of those who violate the conditions of an initial term. The United States argues that district courts had the power to do so under the prior law, and that this cures any *ex post facto* problems. We agree with the Government as to the interpretation of prior law, and we find that consideration of the *Ex Post Facto* Clause is unnecessary.

## I

In the Sentencing Reform Act of 1984, § 212(a)(2), 98 Stat. 1999, Congress eliminated most forms of parole in favor of supervised release, a form of postconfinement monitoring overseen by the sentencing court, rather than the Parole Commission. See *Gozlon-Peretz* v. *United States,* 498 U. S. 395, 400–401 (1991). The sentencing court was authorized to impose a term of supervised release to follow imprisonment, with the maximum length of the term varying according to the severity of the initial offense. See 18 U. S. C. §§ 3583(a), (b). While on supervised release, the offender was required to abide by certain conditions, some specified by statute and some imposable at the court's discretion. See § 3583(d). Upon violation of a condition, 18 U. S. C. § 3583(e)(3) (1988 ed., Supp. V) authorized the court to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on post-release supervision . . . ."[1] Such was done here.

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**Edward M. Chikofsky* and *Barbara E. Bergman* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

In October 1993, petitioner Cornell Johnson violated 18 U. S. C. § 1029(b)(2), a Class D felony. In March 1994, the United States District Court for the Eastern District of Tennessee sentenced him to 25 months' imprisonment, to be followed by three years of supervised release, the maximum term available under § 3583(b) for a Class D felony. Johnson was released from prison on August 14, 1995, having received good-conduct credits, and began serving his 3-year term of supervised release. Some seven months into that term, he was arrested in Virginia and later convicted of four state forgery-related offenses. He was thus found to have violated one of the conditions of supervised release made mandatory by § 3583(d), that he not commit another crime during his term of supervised release, and one imposed by the District Court, that he not leave the judicial district without permission.

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[1] The current version of § 3583(e)(3) reads slightly differently, but for reasons discussed below, we focus on the law in effect at the time of Johnson's initial crime.

The District Court revoked Johnson's supervised release, imposed a prison term of 18 months, and ordered Johnson placed on supervised release for 12 months following imprisonment. App. 40–41. For this last order, the District Court did not identify the source of its authority, though under Circuit law it might have relied on § 3583(h), a subsection added to the statute in 1994, see Violent Crime Control and Law Enforcement Act of 1994, § 110505(2)(B), 108 Stat. 2017. Subsection (h) explicitly gave district courts the power to impose another term of supervised release following imprisonment, a power not readily apparent from the text of § 3583(e)(3) (set out *infra*, at 704).

Johnson appealed his sentence, arguing that § 3583(e)(3) gave district courts no such power and that applying § 3583(h) to him violated the *Ex Post Facto* Clause of the Constitution, Art. I, § 9. The Sixth Circuit, joining the majority of the Federal Courts of Appeals, had earlier taken Johnson's position as far as the interpretation of § 3583(e)(3) was concerned, holding that it did not authorize a district court to impose a new term of supervised release following revocation and reimprisonment. See *United States* v. *Truss*, 4 F. 3d 437 (CA6 1993).[2] It nonetheless affirmed the District Court, judgt. order reported at 181 F. 3d 105 (1999), reasoning that the application of § 3583(h) was not retroactive at all, since revocation of supervised release was punishment for Johnson's violation of the conditions of supervised release, which occurred after the 1994 amendments. With no retroactivity, there could be no *Ex Post Facto* Clause violation. See App. 49 (citing *United States* v. *Abbington,* 144 F. 3d 1003, 1005 (CA6), cert. denied, 525 U. S. 933 (1998)). Other Circuits had held to the contrary, that revocation and reimprisonment were punishment for the original offense. From that perspective, application of § 3583(h) was retroactive and at odds with the *Ex Post Facto* Clause.[3] We granted certiorari to resolve the conflicts, 528 U. S. 950 (1999), and now affirm.

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[2] Of the 11 Circuits to consider the issue, 9 had reached this conclusion. See, *e. g.*, *United States* v. *Koehler*, 973 F. 2d 132 (CA2 1992); *United States* v. *Malesic*, 18 F. 3d 205 (CA3 1994); *United States* v. *Cooper*, 962 F. 2d 339 (CA4 1992); *United States* v. *Holmes*, 954 F. 2d 270 (CA5 1992); *United States* v. *Truss*, 4 F. 3d 437 (CA6 1993); *United States* v. *McGee*, 981 F. 2d 271 (CA7 1992); *United States* v. *Behnezhad*, 907 F. 2d 896 (CA9 1990); *United States* v. *Rockwell*, 984 F. 2d 1112 (CA10 1993); *United States* v. *Tatum*, 998 F. 2d 893 (CA11 1993). Two, the First and the Eighth, found that § 3583(e)(3) did grant district courts such power. See *United States* v. *O'Neil*, 11 F. 3d 292 (CA1 1993); *United States* v. *Schrader*, 973 F. 2d 623 (CA8 1992).

## II

The heart of the *Ex Post Facto* Clause, U. S. Const., Art. I, § 9, bars application of a law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed . . . ." *Calder* v. *Bull,* 3 Dall. 386, 390 (1798) (emphasis deleted). To prevail on this sort of *ex post facto* claim, Johnson must show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted. See *California Dept. of Corrections* v. *Morales,* 514 U. S. 499, 506–507, n. 3 (1995).

### A

The Sixth Circuit, as mentioned earlier, disposed of the *ex post facto* challenge by applying its earlier cases holding the application of § 3583(h) not retroactive at all: revocation of supervised release "imposes punishment for defendants' new offenses for violating the conditions of their supervised release." *United States* v. *Page,* 131 F. 3d 1173, 1176 (1997). On this theory, that is, if the violation of the conditions of supervised release occurred after the enactment of § 3583(h), as Johnson's did, the new law could be given effect without applying it to events before its enactment.

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[3] See, *e. g., United States* v. *Eske,* 189 F. 3d 536, 539 (CA7 1999); *United States* v. *Lominac,* 144 F. 3d 308, 312 (CA4 1998); *United States* v. *Dozier,* 119 F. 3d 239, 241 (CA3 1997); *United States* v. *Collins,* 118 F. 3d 1394, 1397 (CA9 1997); *United States* v. *Meeks,* 25 F. 3d 1117, 1124 (CA2 1994) (addressing § 3583(g)). In contrast to these cases, the First and Eighth Circuits, relying on their broader construction of § 3583(e)(3), concluded that application of § 3583(h) did not violate the *Ex Post Facto* Clause. See *United States* v. *Sandoval,* 69 F. 3d 531 (CA1 1995) (unpublished), cert. denied, 519 U. S. 821 (1996); *United States* v. *St. John,* 92 F. 3d 761 (CA8 1996).

While this understanding of revocation of supervised release has some intuitive appeal, the Government disavows it, and wisely so in view of the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release. Although such violations often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. See 18 U. S. C. § 3583(e)(3) (1988 ed., Supp. V). Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties. See, *e. g., United States* v. *Wyatt,* 102 F. 3d 241, 244–245 (CA7 1996) (rejecting double jeopardy challenge on ground that sanctions for violating the conditions of supervised release are part of the original sentence); *United States* v. *Beals,* 87 F. 3d 854, 859–860 (CA7 1996) (noting that punishment for noncriminal violations must be justified by reference to original crimes), overruled on other grounds, *United States* v. *Withers,* 128 F. 3d 1167 (1997); *United States* v. *Meeks,* 25 F. 3d 1117, 1123 (CA2 1994) (noting absence of constitutional procedural protections in revocation proceedings). Cf. *Gagnon* v. *Scarpelli,* 411 U. S. 778, 782 (1973) ("Probation revocation . . . is not a stage of a criminal prosecution"). For that matter, such treatment is all but entailed by our summary affirmance of *Greenfield* v. *Scafati*, 277 F. Supp. 644 (Mass. 1967) (three-judge court), summarily aff'd, 390 U. S. 713 (1968), in which a three-judge panel forbade on *ex post facto* grounds the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment. We therefore attribute postrevocation penalties to the original conviction.

### B

Since postrevocation penalties relate to the original offense, to sentence Johnson to a further term of supervised release under § 3583(h) would be to apply this section retroactively (and to raise the remaining *ex post facto* question, whether that application makes him worse off). But before any such application (and constitutional test), there is a question that neither party addresses. The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively. See, *e. g.*, *Lynce* v. *Mathis*, 519 U. S. 433, 439 (1997); *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994). Quite independent of the question whether the *Ex Post Facto* Clause bars retroactive application of § 3583(h), then, there is the question whether Congress intended such application. Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests. See *id.*, at 270.

The Government offers nothing indicating congressional intent to apply § 3583(h) retroactively. The legislative decision to alter the rule of law established by the majority interpretation of § 3583(e)(3) (no authority for supervised release after revocation and reimprisonment) does not, by itself, tell us when or how that legislative decision was intended to take effect. See *Rivers* v. *Roadway Express*, *Inc.*, 511 U. S. 298, 304–307 (1994). Neither is there any indication of retroactive purpose in the omission of an express effective date from the statute. The omission simply remits us to the general rule that when a statute has no effective date, "absent a clear direction by Congress to the contrary, [it] takes effect on the date of its enactment." *Gozlon-Peretz*, 498 U. S., at 404.[4]

Nor, finally, has Congress given us anything expressly identifying the relevant conduct in a way that would point to retroactive intent. It may well be that Congress, like the Sixth Circuit, believed that § 3583(h) would naturally govern sentencing proceedings for violations of supervised release that took place after the statute's enactment, simply because the violation was the occasion for imposing the sanctions.[5] But Congress gave us no clear indication to this effect, and we have already rejected that theory; the relevant conduct is the initial offense. In sum, there being no contrary intent, our longstanding presumption directs that § 3583(h) applies only to cases in which that initial offense occurred after the effective date of the amendment, September 13, 1994.

Given this conclusion, the case does not turn on whether Johnson is worse off under § 3583(h) than he previously was under § 3583(e)(3), as subsection (h) does not apply, and the *ex post facto* question does not arise. The case turns, instead, simply on whether § 3583(e)(3) permitted imposition of supervised release following a recommitment.[6]

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[4] Indeed, the Sentencing Guidelines identify the effective date of § 3583(h) as September 13, 1994. United States Sentencing Commission, Guidelines Manual § 7B1.3, comment., n. 2 (Nov. 1998) (USSG). So, too, have the federal courts. See, *e. g., United States* v. *Hale*, 107 F. 3d 526, 529, n. 3 (CA7 1997).

[5] The failure to specify an effective date evidences at least arguable diffidence on this point. Another section of the same Act that added § 3583(h) amended 18 U. S. C. § 3553 to limit the applicability of some statutory minimum sentences. See § 80001, 108 Stat. 1985. That amendment, the section made explicit, "shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act." § 80001(c), 108 Stat. 1986.

## III

Section 3583(e), at the time of Johnson's conviction, authorized a district court to

> "(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;
>
> "(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and . . . modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

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[6] We took a similar approach in *Cisneros* v. *Alpine Ridge Group*, 508 U. S. 10 (1993). The respondents in that case were private developers who had entered into contracts with the Department of Housing and Urban Development. When the Department sought to recalibrate payments it owed under the contracts, the developers sued, and the Ninth Circuit ruled that the Department's proposed method of calculating payments was prohibited by the contracts. Congress subsequently passed legislation explicitly authorizing that method of calculation. The developers resisted application of that legislation to their contracts on the grounds that it retroactively deprived them of vested contractual rights, in violation of the Due Process Clause. We ruled (disagreeing with the Ninth Circuit's earlier holding) that the Department's methodology was acceptable under the contracts as signed. Finding the governmental action permitted by the old law, we declined to consider the constitutional consequences of a legislative attempt to change the applicable law.

> "(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for the time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission . . . ."

The text of subsection (e)(3) does not speak directly to the question whether a district court revoking a term of supervised release in favor of reimprisonment may require service of a further term of supervised release following the further incarceration. And if we were to concentrate exclusively on the verb "revoke," we would not detect any suggestion that the reincarceration might be followed by another term of supervised release, the conventional understanding of "revoke" being simply "to annul by recalling or taking back." Webster's Third New International Dictionary 1944 (1981). There are reasons, nonetheless, to think that the option of further supervised release was intended.

First, there are some textual reasons, starting with the preceding subsection (e)(1). This is an unequivocal provision for ending the term of supervised release without the possibility of its reimposition or continuation at a later time. Congress wrote that when a court finds that a defendant's conduct and the interests of justice warrant it, the court may "terminate a term of supervised release and discharge the person released," once at least a year of release time has been served. If application of subsection (3) had likewise been meant to conclude any possibility of supervised release later, it would have been natural for Congress to write in like terms. It could have provided that upon finding a defendant in violation of the release conditions the court could "terminate a term of supervised release" and order the defendant incarcerated for a term as long as the original supervised release term. But that is not what Congress did. Instead of using "terminate" with the sense of finality just illustrated in subsection (1), Congress used the verb "revoke" and so at the least left the door open to a reading of subsection (3) that would not preclude further supervised release after the initial revocation.[7] In fact, the phrasing of subsection (3) did more than just leave the door open to the nonpreclusive reading.

As it was written before the 1994 amendments, subsection (3) did not provide (as it now does) that the court could revoke the release term and require service of a prison term equal to the maximum authorized length of a term of supervised release. It provided, rather, that the court could "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release . . . ." So far as the text is concerned, it is not a "term of imprisonment" that is to be served, but all or part of "the term of supervised release." But if "the term of supervised release" is being served, in whole or part, in prison, then something about the term of supervised release survives the preceding order of revocation. While this sounds very metaphysical, the metaphysics make one thing clear: unlike a "terminated" order of supervised release, one that is "revoked" continues to have some effect. And since it continues in some sense after revocation even when part of it is served in prison, why can the balance of it not remain effective as a term of supervised release when the reincarceration is over?[8]

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[7] The dissent offers an erudite explanation of the different senses of the two words, intending to demonstrate that Congress displayed "an admirably precise use of language," by using "revoke" to mean "annul" and "terminate" to indicate that "[t]he supervised release is treated as fulfilled, and the sentence is complete." *Post,* at 717 (opinion of SCALIA, J.). That is virtuoso lexicography, but it shows only that English is rich enough to give even textualists room for creative readings. This one encounters serious difficulties; the very same section of the statute (as in effect at the time of Johnson's offense) provides that if the person released is found in possession of a controlled substance, "the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release." 18 U. S. C. § 3583(g) (1988 ed.).

Without more, we would have to admit that Congress had used "revoke" in an unconventional way in subsection (3), but it turns out that the unconventional sense is not unheard of. See *United States* v. *O'Neil*, 11 F. 3d 292, 295–296 (CA1 1993). Webster's Third New International Dictionary (our edition of which was issued three years before the 1984 Act) reveals that "revoke" can mean "to call or summon back," without the implication (here) that no further supervised release is subsequently possible. It gives "recall" as a synonym and comments that "RECALL in this sense indicates a calling back, suspending, or abrogating, either finally as erroneous or ill-advised or tentatively for deliberation . . . ." *Ibid.*[9] The unconventional dictionary definition is not, of

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[8] JUSTICE SCALIA, *post*, at 721, thinks the "term" survives only as a measure of duration, but of course the statute does not read "require the person to serve a term in prison equal to all or part of the term of supervised release . . . ."

[9] While this sense is of course less common, the most recent editions of the most authoritative dictionaries do not tag it as rare or obsolete. The Oxford English Dictionary gives five examples of this usage, albeit hardly recent ones: three are drawn from the late 16th century and the most recent from 1784. 13 Oxford English Dictionary 838 (2d ed. 1989). But the OED is unabashedly antiquarian; of its examples for the more common meaning of "revoke," the most recent dates from 1873. *Ibid.* Webster's, it should be noted, includes the less common meaning, without antiquarian reproach, in its third edition. Webster's Third New International Dictionary 1944 (1981).

As JUSTICE SCALIA remarks, in relying on an uncommon sense of the word, we are departing from the rule of construction that prefers ordinary meaning, see *post*, at 715. But this is exactly what ought to happen when the ordinary meaning fails to fit the text and when the realization of clear congressional policy (here, favoring the ability to impose supervised release) is in tension with the result that customary interpretive rules would deliver. See, *e. g.*, *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965) (recognizing "some 'scope for adopting a restricted rather than a literal or course, dispositive (although the emphasis placed upon it by JUSTICE SCALIA might suggest otherwise, see *post*, at 718–719). What it does do, however, is to soften the strangeness of Congress's unconventional sense of "revoke" as allowing a "revoked" term of supervised release to retain vitality after revocation. It shows that saying a "revoked" term of supervised release survives to be served in prison following the court's reconsideration of it is consistent with a secondary but recognized definition, and so is saying that any balance not served in prison may survive to be served out as supervised release.

A final textually based point is that the result of recognizing Congress's unconventional usage of "revoke" is far less remarkable even than the unconventional usage. Let us suppose that Congress had legislated in language that un-

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usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute'") (quoting *Helvering* v. *Hammel*, 311 U. S. 504, 510–511 (1941); *In re Chapman*, 166 U. S. 661, 667 (1897) ("[N]othing is better settled, than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion"). When text implies that a word is used in a secondary sense and clear legislative purpose is at stake, JUSTICE SCALIA's cocktail-party textualism, *post*, at 718, must yield to the Congress of the United States. (Not that we consider usage at a cocktail party a very sound general criterion of statutory meaning: a few nips from the flask might actually explain the solecism of the dissent's gunner who "revoked" his bird dog, *post*, at 719–720, n. 4; in sober moments he would know that dogs cannot be revoked, even though sentencing orders can be. His mistake, in any case, tells us nothing about how Congress may have used "revoke" in the statute. The gunner's error is, as JUSTICE SCALIA notes, one of current usage. (It is not merely that we do not "revoke" dogs in a "literal" sense today, as JUSTICE SCALIA puts it; we do not revoke them at all.) The question before us, however, is one of definition as distinct from usage: when Congress employed the modern usage in providing that a term of supervised release could be revoked, was it employing the most modern meaning of the term "revoke"? Usage can be a guide but not a master in answering a question of meaning like this one. JUSTICE SCALIA's argument from the current unacceptability of the dog and ox examples thus jeopardizes sound statutory construction rather more severely than his sportsman ever threatened a bird.)

equivocally supported the dissent, by writing subsection (3) to provide that the judge could "revoke" or "terminate" the term of supervised release and sentence the defendant to a further term of incarceration. There is no reason to think that under that regime the court would lack the power to impose a subsequent term of supervised release in accordance with its general sentencing authority under 18 U. S. C. § 3583(a). This section provides that "[t]he court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment . . . ." Thus, on the dissent's reading, when Johnson's supervised release was revoked and he was committed to prison, the District Court "impos[ed] a sentence to a term of imprisonment." See, *e. g.*, App. 36, 39. And that sentence was, as already noted, imposed for his initial offense, the Class D felony violation of § 1029(b)(2). See *supra*, at 699–701. Nor would it be mere formalism to link the second prison sentence to the initial offense; the gravity of the initial offense determines the maximum term of reimprisonment, see § 3583(e)(3), just as it controls the maximum term of supervised release in the initial sentencing, see § 3583(b). Since on the dissent's understanding the resentencing proceeding would fall literally and sensibly within the terms of § 3583(a), a plain meaning approach would find authority for reimposition of supervised release there. Cf. *United States* v. *Wesley*, 81 F. 3d 482, 483–484 (CA4 1996) (finding that § 3583(a) grants power to impose a term of supervised release following reimprisonment at resentencing for violation of probation).

There is, then, nothing surprising about the consequences of our reading. The reading also enjoys the virtue of serving the evident congressional purpose. The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty. See, *e. g., United States* v. *Johnson, ante,* at 59 ("Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration"). The Senate Report was quite explicit about this, stating that the goal of supervised release is "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release." S. Rep. No. 98–225, p. 124 (1983).

Prisoners may, of course, vary in the degree of help needed for successful reintegration. Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it. See *id.,* at 125 ("In effect, the term of supervised release provided by the bill takes the place of parole supervision under current law. Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it"). Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most. But forbidding the reimposition of supervised release after revocation and reimprisonment would be fundamentally contrary to that scheme. A violation of the terms of supervised release tends to confirm the judgment that help was necessary, and if any prisoner might profit from the decompression stage of supervised release, no prisoner needs it more than one who has already tried liberty and failed. He is the problem case among problem cases, and a Congress asserting that "every releasee who does need supervision will receive it," *ibid.,* seems very unlikely to have meant to compel the courts to wash their hands of the worst cases at the end of reimprisonment.[10]

The idea that a sentencing court should have authority to subject a reincarcerated prisoner to further supervised release has support, moreover, in the pre-Guidelines practice with respect to nondetentive monitoring, as illuminated in *United States* v. *O'Neil,* 11 F. 3d 292 (CA1 1993). The Sentencing Guidelines, after all, "represent an approach that begins with, and builds upon," pre-Guidelines law, see USSG, ch. 1, pt. A, intro. comment. 3, and when a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the precursor in fathoming the new law. Cf. *INS* v. *Cardoza-Fonseca,* 480 U. S. 421, 432–434 (1987) (examining practice under precursor statute to determine meaning of amended statute).

Two sorts of nondetentive monitoring existed before the introduction of supervised release: probation and parole. Of these pre-Guidelines options, the one more closely analogous to supervised release following imprisonment was parole, which by definition was a release under supervision of a parole officer following service of some term of incarceration. Courts have commented on the similarity. See, *e. g., Meeks,* 25 F. 3d, at 1121 ("[S]upervised release is essentially similar to parole"); *United States* v. *Paskow,* 11 F. 3d 873, 881 (CA9 1993) ("Supervised release and parole are virtually identical systems").

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[10] JUSTICE SCALIA attributes the strong preference for supervised release at the conclusion of a prison term to this Court, *post,* at 724, when that view of penal policy comes not from the Court but from Congress. The point is crucial. Our obligation is to give effect to congressional purpose so long as the congressional language does not itself bar that result. See, *e. g., Holloway* v. *United States,* 526 U. S. 1, 9 (1999) (noting that statutory language should be interpreted in light of congressional policy); *Caron* v. *United States,* 524 U. S. 308, 315 (1998) (rejecting petitioner's reading of a statute because it "yields results contrary to a likely, and rational, congressional policy"). One who believes that courts must not look beyond text might well find any invocation of policy unjustified (even willful), at least when the policy does not rise unbidden from the words of the statute, but we have never treated the text as such a jealous guide and have traditionally sought to construe a statute so as to reach results consistent with what Chief Justice Taney called "its object and policy." See *United States* v. *Heirs of Boisdoré,* 8 How. 113, 122 (1849). And in what Chief Justice Marshall called the attempt "to discover the design of the legislature," we have "seize[d] every thing from which aid can be derived." *United States* v. *Fisher,* 2 Cranch 358, 386 (1805).

In thinking about this case, it is striking that the provisions of the former parole scheme dealing with the consequences of violating parole conditions repeatedly used the verb "revoke." See, *e. g.,* 18 U. S. C. § 4214(d)(5) (1982 ed.) (repealed 1984, Pub. L. 98–473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031) (revocation of parole); 21 U. S. C. § 841(c) (1982 ed.) (repealed 1984) (revocation of special parole). And yet there seems never to have been a question that a new term of parole could follow a prison sentence imposed after revocation of an initial parole term.[11] See, *e. g.,* 28 CFR § 2.52(b)

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[11] The same is true of special parole, part of the required sentence for certain drug offenses. Though the special parole statute did not explicitly authorize reimposition of special parole after revocation of the initial term and reimprisonment, the Parole Commission required it. See 28 CFR § 2.57(c) (1999). Some courts have recently decided that this regulation is inconsistent with 21 U. S. C. § 841(c) (1982 ed.), see, *e. g., Evans* v. *United States Parole Comm'n,* 78 F. 3d 262 (CA7 1996), but this does not affect the backdrop against which Congress legislated in 1984.

As for probation, the sentencing court's power to order a new term following revocation was the subject of some disagreement. The pre-Guidelines statute authorized the court to "revoke the probation and . . . impose any sentence which might originally have been imposed." 18 U. S. C. § 3653 (1982 ed.) (repealed). The statute thus clearly specified that the options for postrevocation sentencing were those available at the original sentencing; courts disputed only whether probation was a "sentence" that could be imposed. See *O'Neil,* 11 F. 3d, at 298–299 (collecting cases). The dispute over what counted as a sentence does not affect the broader point that a court's powers at the original sentencing are the baseline from which powers at resentencing are determined. Nor is our

(1999) (following revocation of parole, Sentencing Commission will determine whether reparole is warranted); *O'Neil, supra,* at 299; *United States Parole Comm'n* v. *Williams,* 54 F. 3d 820, 824 (CADC 1995) (noting "the established pre-Guidelines sentencing principle that parole is available unless expressly precluded" (citation and internal quotation marks omitted)).[12] Thus, "revocation" of parole followed by further imprisonment was not a mere termination of a limited liberty that a defendant could experience only once per conviction, and it is fair to suppose that in the absence of any textual bar "revocation" of parole's replacement, supervised release, was meant to leave open the possibility of further supervised release, as well.

As seen already, "revoke" is no such bar, and we find no other. The proceeding that follows a violation of the conditions of supervised release is not, to be sure, a precise reenactment of the initial sentencing. Section 3583(e)(3) limits the possible prison term to the duration of the term of supervised release originally imposed. (If less than the maximum has been imposed, a court presumably may, before revoking the term, extend it pursuant to § 3583(e)(2); this would allow the term of imprisonment to equal the term of supervised release authorized for the initial offense.) The new prison term is limited further according to the gravity of the original offense. See § 3583(e)(3). But nothing in these specific

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analysis of supervised release drawn into question by the fact that courts could not, for violations of probation, impose imprisonment followed by probation. Probation, unlike supervised release, was an alternative to imprisonment. Courts did not have the power to impose both at the original sentencing, so their inability to do so at subsequent sentencings is no surprise.

[12] The dissent seems to misconstrue our discussion of pre-Guidelines practice, see *post,* at 724–726, claiming that the practice is unilluminating because the possibility of parole inhered in any prison sentence. But our point simply is that, metaphysics aside, Congress gave no indication that it thought supervised release after reincarceration would be less valuable than reparole after reincarceration had been.

provisions suggests that the possibility of supervised release following imprisonment was meant to be eliminated.[13]

In sum, from a purely textual perspective, the more plausible reading of § 3583(e)(3) before its amendment and the addition of subsection (h) leaves open the possibility of supervised release after reincarceration. Pre-Guidelines practice, linguistic continuity from the old scheme to the current one, and the obvious thrust of congressional sentencing policy confirm that, in applying the law as before the enactment of subsection (h), district courts have the authority to order terms of supervised release following reimprisonment.

The judgment of the Court of Appeals for the Sixth Circuit is

*Affirmed.*

JUSTICE KENNEDY, concurring in part.

The Court holds that 18 U. S. C. § 3583(e)(3), as it stood before the amendment adding what is now subsection (h), permits a trial court to impose further incarceration followed by a period of supervised release after revoking an earlier supervised release because the conditions were violated. In my view this is the correct result. The subsection permits a court to "require [a] person to serve in prison all or part of the term of supervised release" originally imposed. 18 U. S. C. § 3583(e)(3) (1988 ed., Supp. V). This indicates that after the right to be on supervised release has been revoked there is yet an unexpired term of supervised release that can be allocated, in the court's discretion, in whole or in part to confinement and to release on such terms and conditions as the court specifies. This was the convincing analysis adopted by the Court of Appeals for the First Circuit in reaching the same conclusion, and it suffices to resolve the case. See *United States* v. *O'Neil*, 11 F. 3d 292 (1993). The analysis, moreover, is no less fair than JUSTICE SCALIA's, *post*, at 722, n. 5 (dissenting opinion), which, after explaining at length that the only possible meaning of "revoke a term" is "'to annul'" it, *post*, at 715, to "'cancel'" it, *post*, at 716, and to treat it "as though it had never existed," *post*, at 717, explains away the statute's later inconvenient reference to "the term of supervised release" as "describ[ing] the *length* of the permitted imprisonment by reference to that now-defunct term of supervised release," *post*, at 721. This, of course, is not what the text says. Indeed, for support JUSTICE SCALIA turns to Congress' use of "terminate" in § 3583(g)—which JUSTICE SCALIA elsewhere concedes "was a mistake." *Post*, at 718, n. 2. Faced with a choice between two difficult readings of what all must admit is not optimal statutory text, the Court is correct to adopt the interpretation that makes the most sense.

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[13] Nor does our traditional rule of lenity in interpreting criminal statutes demand a contrary result. Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved (not the case here), and in any event the rule of lenity would be Delphic in this case. There is simply no way to tell whether sentencing courts given the option of supervised release will generally be more or less lenient in fixing the second prison sentence.

I would not go on to suggest, as the Court does, that a court could extend a term of supervised release pursuant to § 3583(e)(2) prior to revoking the term under § 3583(e)(3). *Ante*, at 712. The subparts of § 3583(e) are phrased in the disjunctive; and § 3583(e)(3) must stand on its own. This suggests the term of imprisonment plus any further term of supervised release imposed under § 3583(e)(3) may not exceed the original term of supervised release that had been imposed and then violated.

Nor would I invoke 18 U. S. C. § 3583(a), *ante*, at 708, which raises more issues than it resolves, not the least of which is the description of the District Court's action as "imposing a sentence." Petitioner's sentence was imposed upon conviction. What is at issue in this case is the appropriate adjustment to make to that sentence when the prisoner has violated the conditions of supervised release.

With these observations I join the opinion of the Court, save for its parenthetical discussion of § 3583(e)(2), *ante*, at 712, and its dictum regarding § 3583(a), *ante*, at 708.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court's textual analysis of 18 U. S. C. § 3583(e)(3) (1988 ed., Supp. V), and think that analysis sufficient to resolve this case. I agree with JUSTICE KENNEDY that the Court's discussions of § 3583(a), *ante*, at 707–708, and § 3583(e)(2), *ante*, at 712, are unnecessary to the result. I would not rely, as the Court (*ante*, at 708–710) and JUSTICE KENNEDY (*ante* this page (opinion concurring in part)) do, on any apparent congressional purpose supporting the Court's reading of § 3583(e)(3). With these observations, I concur in the judgment.

JUSTICE SCALIA, dissenting.

I agree with Parts I and II of the Court's opinion, and thus, like the Court, believe that the case ultimately turns on the meaning of 18 U. S. C. § 3583(e)(3) (1988 ed., Supp. V). I do not agree, however, with the Court's interpretation of that provision. The section provides that when the conditions of supervised release are violated, the court may "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." Finding in this an authorization for imposition of *additional* supervised release is an act of willpower rather than of judgment.

The term "revoke" is not defined by the statute, and thus should be construed "in accordance with its ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U. S. 471, 476 (1994). As the Court recognizes, the ordinary meaning of "revoke" is " 'to annul by recalling or taking back.' " *Ante*, at 704 (quoting Webster's Third New International Dictionary 1944 (1981)); see also American Heritage Dictionary 1545 (3d ed.

1992) (defining "revoke" as "[t]o void or annul by recalling, withdrawing, or reversing; cancel; rescind"). Under this reading, the "revoked" term of supervised release is simply canceled; and since there is no authorization for a new term of supervised release to replace the one that has been revoked, additional supervised release is unavailable.

The Court is not content with this natural reading, however, and proceeds to adopt what it calls an "unconventional" reading of "revoke," *ante*, at 706, as meaning "to call or summon back" without annulling, *ibid.*[1] It thereby concludes that the revoked term of supervised release retains some effect, and thus that additional supervised release may be required after reimprisonment. The Court suggests that its abandonment of ordinary meaning is justified by the text, by congressional purpose, and by analogy to pre-Guidelines practice regarding nondetentive monitoring. None of the proffered reasons is convincing.

The Court claims textual support for its "unconventional" reading in the fact that subsection (e)(3), at issue here, uses the term "revoke," while subsection (e)(1) uses the term "terminate." Since, the Court reasons, the two terms should not be interpreted to have exactly the same meaning, (1) the statute must intend a "less common" meaning of "revoke," namely, "call back," see *ante*, at 706, and n. 9; and (2) this "less common" meaning authorizes the later imposition of supervised release. Each part of this two-step analysis is patently false.

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[1] Describing the Court's reading as "unconventional" makes it sound perfectly O. K. There are, after all, unconventional houses, unconventional hairdos, even unconventional batting stances, all of which are fine. Houses, hairdos, and batting stances, however, have an independent existence apart from convention, whereas words are nothing but a convention—particular sounds which by agreement represent particular concepts, and (in the case of most written languages) particular symbols which by agreement represent particular sounds. Thus, when the Court admits that it is giving the word "revoke" an "unconventional" meaning, it says that it is choosing to ignore the word "revoke."

As to the first: The usual, ordinary-English definition of "revoke" is already amply distinguishable from "terminate," and does not have to be tortured into Old English (or actually, transliteration from Old Latin) in order to explain the choice of words. "Terminate" connotes completion rather than cancellation. See American Heritage Dictionary 1852 (3d ed. 1992) (defining "terminate" as "[t]o bring to an end or a halt" or "[t]o occur at or form the end of; conclude or finish"); Webster's New International Dictionary 2605 (2d ed. 1942) (defining "terminate" as "[t]o put an end to; to make to cease; to end . . . to form the conclusion of . . ."). Using "terminate" in subsection (e)(1) and "revoke" (in its ordinary sense) in subsection (e)(3) is not only not inexplicable; it reflects an admirably precise use of language. In subsection (e)(1), the term of supervised release is "terminated" ("brought to an end") because termination is warranted "by the conduct of the defendant released and the interest of justice." The supervised release is treated as fulfilled, and the sentence is complete. In subsection (e)(3), by contrast, the supervised release term is not merely brought to an end; it is annulled and treated as though it had never existed, the defendant receiving no credit for any supervised release served. It would be hard to pick two words more clearly connoting these distinct consequences than "terminate" and "revoke."[2]

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[2] The Court is correct, *ante*, at 705, n. 7, that my suggested explanation of the difference between "terminate" and "revoke" does not comport with the use of "terminate" in §3583(g). But the use of the term in that subsection *also* contradicts *the Court's* explanation of the difference between the two terms—viz., that "terminate," unlike in its view "revoke," "conclude[s] any possibility of supervised release later," *ante*, at 704. For the Court evidently believes (contrary to the use of "terminate" in §3583(g)) that further supervised release is available when a supervisee is reimprisoned for possession of a controlled substance. It would be "fundamentally contrary" to the congressional scheme, the Court asserts, if supervised release following reimprisonment were not available for "one who has already tried liberty and failed," *ante*, at 709. But the use of "terminate" in

The first step of the Court's analysis—its inference that the use of "terminate" in subsection (e)(1) requires its alternative meaning of "revoke" in subsection (e)(3)—is also wrong because the alternative meaning that the Court posits ("to call or summon back," without the implication of annulment, *ante*, at 706) is not merely (as the Court says) "less common," *ante*, at 706, n. 9; in the context that is relevant here, it is utterly unheard of. One can "call or summon back" a person or thing without implication of annulment, but it is quite impossible to "call or summon back" an order or decree without that implication—which is precisely why the primary meaning of revoke has shifted from its root meaning ("call or summon back") to the meaning that it bears in its most common context, *i. e.*, when applied to orders or decrees ("cancel or annul"). Of course the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny. The Court's assigned meaning would surely fail that test, even late in the evening. Try telling someone, "Though I do not cancel or annul my earlier action, I revoke it." The notion that Con-

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§ 3583(g) prescribes just that. Further, § 3583(g) undermines the Court's argument that because § 3583(e)(3) authorizes the court to "revoke a term of supervised release" and then to require "all or part of the term" to be served in prison, the revoked term must retain some metaphysical vitality. See *ante*, at 705–706. This is so because § 3583(g) provides that the court shall "terminate the term of supervised release" (hence extinguishing it even in the Court's view), and yet goes on to provide that the court shall require the defendant to serve at least one-third of "the term of supervised release" in prison. See *infra*, at 721. So on either the Court's interpretation of the difference between "terminate" and "revoke" or on mine, the use of "terminate" in § 3583(g) was a mistake—which is why Congress has since amended it to read "revoke." See § 110505, 108 Stat. 2017. See also Brief for United States 25, n. 20 ("Congress apprehended that the term 'terminate' was inappropriate [in § 3583(g)]"). If we both concede it was a mistake, that leaves my explanation of the difference between "terminate" in § 3583(e)(1) and "revoke" in § 3583(e)(3) uncontradicted.

gress, by the phrase "revoke a term of supervised release," meant "recall but not cancel a term of supervised release" is both linguistically and conceptually absurd.

The dictionary support that the Court seeks to enlist for its definition is fictitious. It is indeed the case that both the Oxford English Dictionary and Webster's Third New International Dictionary give as a meaning of "revoke" "to call or summon back"; but neither of them adds the fillip that is essential to the Court's point—that the thing called back "retain vitality." *Ante,* at 707. They say nothing at all about the implication of calling or summoning back—which, in the case of calling or summoning back an order or decree, is necessarily annulment.[3] Further, while the dictionaries the Court mentions do not give its chosen meaning "antiquarian reproach," *ante,* at 706, n. 9, many dictionaries do. The New Shorter Oxford shows this usage as obsolete, see New Shorter Oxford English Dictionary 2583 (1993), and the previous edition of Webster's New International shows it as rare, see Webster's New International Dictionary 2134 (2d ed. 1942). Other dictionaries also show the Court's chosen meaning as rare, *e. g.,* Chambers English Dictionary 1257 (1988), as obsolete or archaic, *e. g.,* Cassell Concise English Dictionary 1149 (1992); Funk and Wagnalls New Standard Dictionary 2104 (1957), or do not give it as a meaning at all, *e. g.,* American Heritage Dictionary 1545 (3d ed. 1992).[4]

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[3] As the Court suggests in its quotation of Webster's Third's definition of "RECALL," see *ante,* at 706, the annulment may be only temporary (a "suspension"); but that is so only if there is some authority for repromulgation after the revocation—which leaves the Court no further along than it was before it dipped into the more obscure meanings of "revoke": it must identify some authority to reimpose supervised release. This blends into the next point made in text.

[4] Whether one attributes any currency to "revoke" in the sense of "call back" depends, I think, on whether one counts as current usage *figurative* usage. The OED, while not showing the meaning "to call back" as obsolete, does indicate that its current usage is "chiefly fig[urative]." 13 Ox-

As for the second step of the Court's analysis: Even if there were justification for giving "revoke" something other than its normal meaning, and even if the meaning the Court adopts were not unheard of, the latter meaning *still* does not provide the needed authorization for reimposition of supervised release. The statute does not say that the court may "revoke" ("call back," as the Court would have it) only *part* of the term of supervised release, so there is no argument that some portion remains in place for later use. Thus, even if "revoke" means "call back," a court would need statutory authorization to reimpose this "called back" term of supervised release. But § 3583(e)(3) provides no such authorization. The court is empowered to "revoke" the term; it is empowered to require that "all or part" of the term be served in prison; it is not empowered to reimpose "all or part" of the term as a later term of supervised release.

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ford English Dictionary 838 (2d ed. 1989) (OED). Just as current usage would allow one to say that "the emperor called back his decree," so also it would allow one to say that the emperor "revoked" his decree *in that figurative sense* of "calling it back"—*i. e.*, in the sense of canceling it. It is assuredly *not* current usage, however—I think not even *rare* current usage—to use "revoke" to connote a literal calling back. ("Since my bird dog was ranging too far afield, I revoked him.")

The Court chastises this example, suggesting that only a tippling hunter would "revoke" his bird dog, as "dogs cannot be revoked, even though sentencing orders can be." *Ante*, at 707, n. 9. I could not agree more. However, the definition the Court employs ("call back" without the implication of cancellation) envisions that dogs *can* be revoked—thus illustrating its obscurity. The OED definition on which the Court relies, see *ante*, at 706, n. 9, defines "revoke" as "to recall; to call or summon back . . . an animal or thing." 13 OED 838 (2d ed. 1989). The first example it gives of this usage is as follows: "These hounds . . . being acquainted with their masters watchwordes, eyther in revoking or imboldening them to serve the game." *Ibid.* Of course the Court's "not unheard of" usage, *ante*, at 706, is not limited to recalling dogs—oxen can be revoked as well, as the OED's third example illustrates: "Ye must revoke The patient Oxe unto the Yoke." 13 OED 838.

The Court opines that no authorization for further supervised release is needed, because the fact that the district court may require "all or part of the term of supervised release" to be served in prison demonstrates that the revoked term continues to have some metaphysical effect, *ante,* at 705–706, so that "the balance of it [can] remain effective as a term of supervised release when the reincarceration is over," *ante,* at 706. It demonstrates no such thing. In allowing the district court to require that "all or part of the term of supervised release" be spent in prison, the statute simply describes the *length* of the permitted imprisonment by reference to that now-defunct term of supervised release. It is quite beyond me how the Court can believe that the statute "does not read" this way, *ante,* at 706, n. 8, and the concurrence that "[t]his . . . is not what the text says," *ante,* at 714. A "term of supervised release" in what might be called the *substantive* rather than the *temporal* sense—*i. e.,* the sentence to a period of supervised release—cannot possibly be served in prison. To be in prison is not to be released. The *only* sense in which "all or part of the term of supervised release" can be served in prison is the temporal sense. Cf. *United States* v. *Johnson, ante,* at 57 ("To say respondent was released while still imprisoned diminishes the concept the word intends to convey"). The Court's unrealistic reading is also undermined by the fact that § 3583(g) provides for serving in prison part of "the term of supervised release," in spite of the fact that the term there has been "terminated," so that even the Court would not claim it has ongoing vitality. See n. 2, *supra.* And finally, in concluding that the term of supervised release remains in place, the Court essentially reads the phrase "revoke a term of supervised release" out of the statute, treating the subsection as if it did no more than authorize the court to "require the person to serve in prison all or part of the term of supervised release" originally imposed, § 3583(e)(3). Of course the statute could have been drafted to say just that—allowing the court to require part of the term of supervised release to be served in prison, with the rest of the term remaining in place to be served on supervised release. In the text actually adopted, however, the supervised-release term is *not* left in place, but is explicitly "revoked."[5]

Further, if one assumes, as the Court does, that a revoked term somehow "survives the . . . order of revocation," *ante*, at 705, and retains effect (even without any statutory authorization for reimposition or reactivation), then it would follow that whatever part of it is not required to be served in prison is *necessarily* still in effect. Thus the district court would have no discretion *not* to require the remainder of the term to be served on supervised release. Yet the Court seems to view further supervised release as only an "option." *Ante*, at 704, 713, n. 13; accord, *ante*, at 713–714 (KENNEDY, J., concurring in part).

The Court's confusing discussion of how § 3583(a) would produce consequences similar to those its opinion achieves—and consequences that are entirely reasonable—*if* § 3583(e)(3) read differently from the way it does read, *ante*, at 707–708, is entirely irrelevant. I do not contend that the result the Court reaches is any way remarkable, only that it is not the result called for by the statute. The Court carefully *does not* maintain—and it *could* not, for reasons I need not describe—that subsection (a) justifies imposition of postrevocation supervisory release given the *actual* text of subsection (e)(3), and nothing more is pertinent here. Hypothetical discussion of what role § 3583(a) might play had Congress legislated differently is beside the point.

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[5] The concurrence adjusts for that inconvenient fact by simply changing the object of the verb, concluding that "after *the right to be on supervised release has been revoked* there is yet an unexpired term of supervised release that can be allocated . . . in whole or in part to confinement and to release . . . ." *Ante*, at 713 (KENNEDY, J., concurring in part) (emphasis added). The statute, however, does not revoke "the right to be on supervised release"; it revokes the "term of supervised release" itself, see § 3583(e)(3), which is utterly incompatible with the notion that the term remains in place. Switching the object of "revoke" is no fair in itself, and it leaves the provision entirely redundant, since revoking "the right to be on supervised release" adds nothing to "requir[ing] the person to serve in prison all or part of the term," § 3583(e)(3).

The Court next turns to questions of policy—framed as an inquiry into "congressional purpose." *Ante,* at 708. Citing legislative history (although not legislative history discussing the particular subsection at issue), *ante,* at 709–710, the Court explains what it views as the policies Congress seeks to serve with supervised release generally, and then explains how these general policies would be undermined by reading § 3583(e)(3) as written. "Our obligation," the Court says, "is to give effect to congressional purpose so long as the congressional language does not itself bar that result." *Ante,* at 710, n. 10. I think not. Our obligation is to go as far in achieving the general congressional purpose as the text of the statute fairly prescribes—and no further. We stop where the statutory language does, and do not require explicit prohibition of our carrying the ball a few yards beyond. In any event, as read by any English speaker except one who talks of revoking a dog, the statute does "bar" the result the Court reaches here. The proper canon to govern the present case is quite simple: "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms,'" *United States* v. *Ron Pair Enterprises, Inc.,* 489 U. S. 235, 241 (1989) (quoting *Caminetti* v. *United States,* 242 U. S. 470, 485 (1917)).

Perhaps there is a scrivener's error exception to that canon, see, *e. g., Holloway* v. *United States,* 526 U. S. 1, 19, n. 2 (1999) (SCALIA, J., dissenting); *Green* v. *Bock Laundry Machine Co.,* 490 U. S. 504, 527–528 (1989) (SCALIA, J., concurring in judgment), but the words of today's author in another case well describe why that is inapplicable here: "This case is a far cry from the rare one where the effect of implementing the ordinary meaning of the statutory text would be patent absurdity or demonstrably at odds with the intentions of its drafters." *BFP* v. *Resolution Trust Corporation*, 511 U. S. 531, 563 (1994) (SOUTER, J., dissenting) (citations and internal quotation marks omitted). It would have been entirely reasonable for Congress to conclude that a prisoner who had broken the terms of supervised release seriously enough to be reincarcerated should not be trusted in that status again; and that a judge should not be tempted to impose an inappropriately short period of reimprisonment by the availability of further supervised release. Congress might also have wished to eliminate the unattractive prospect that a prisoner would go through one or even more repetitions of the violation-reimprisonment-supervised-release sequence—which is avoided by requiring the district court confronted with a violation either to leave the prisoner on supervised release (perhaps with tightened conditions and lengthened term, as § 3583(e)(2) permits) or to impose imprisonment, but not to combine the two. Because the interpretation demanded by the text is an entirely plausible one, this Court's views of what is prudent policy are beside the point. And that is so whether those policy views are forthrightly stated as such ("[I]f any prisoner might profit from the decompression stage of supervised release, no prisoner needs it more than one who has already tried liberty and failed," *ante*, at 709), or whether, to give an interpretive odor to the opinion, they are recast as policies that it "seems very unlikely" for Congress to have intended ("Congress . . . seems very unlikely to have meant to compel the courts to wash their hands of the worst cases at the end of reimprisonment," *ante*, at 709–710).

Finally, the Court appeals to pre-Guidelines practice with regard to nondetentive monitoring. But this cannot cure the lack of statutory authorization for additional supervised release. Even if the language of § 3583(e)(3) were ambiguous (which it is not), that history would be of little relevance, since the Sentencing Reform Act's adoption of supervised release was meant to make a significant break with prior practice, see *Mistretta* v. *United States*, 488 U. S. 361, 366 (1989) (describing the Act's "sweeping reforms"); *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 407 (1991) ("Supervised release is a unique method of postconfinement supervision invented by the Congress for a series of sentencing reforms").[6] The Court's effort to equate parole and supervised release, *ante*, at 710–712, is unpersuasive. Unlike parole, which replaced a portion of a defendant's prison sentence, supervised release is a separate term imposed at the time of initial sentencing. Compare 18 U. S. C. § 3583(a) with 18 U. S. C. §§ 4205(a), 4206 (1982 ed.) (repealed); see also USSG ch. 7, pt. A, intro. comment. 2(b). This distinction has important consequences for the present question, since when parole was "revoked" (unlike when supervised release is revoked), there was no need to impose a new term of imprisonment; the term currently being served (on parole) was still in place. Similarly, there was no occasion to impose a new term of parole, since the possibility of parole was inherent in the remaining sentence. See 18 U. S. C. § 4205(a) (1982 ed.) ("Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term . . ."). The question whether further supervised release may be required after revocation of supervised release is so entirely different from the question whether further parole may be accorded after revocation of parole, that the Court's appeal to the parole practice demonstrates nothing except the dire scarcity of arguments available to support its conclusion.[7]

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[6] United States Sentencing Commission, Guidelines Manual ch. 1, pt. A, intro. comment. 3 (Nov. 1998) (USSG), is not to the contrary. The Court quotes the comment for the broad proposition that "[t]he Sentencing Guidelines, after all, 'represent an approach that begins with, and builds upon,' pre-Guidelines law." *Ante*, at 710. The comment itself, however, makes the much more narrow point that data on sentences imposed pre-Guidelines were used as a "starting point" in devising sentencing ranges under the Guidelines. The sentence from which the Court quotes states: "Despite . . . policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data." USSG ch. 1, pt. A, intro. comment. 3. This sheds no light on the extent to which prior practice in matters other than length of sentence underlay the Guidelines, much less on the extent to which such prior practice is a meaningful guide to statutory interpretation in general—and even less to statutory interpretation pertaining to supervised release, which the Guidelines elsewhere refer to as "a new form of post-imprisonment supervision created by the Sentencing Reform Act," *id.*, ch. 7, pt. A, intro. comment. 2(b).

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[7] The Court also appeals to pre-Guidelines practice regarding probation and special parole. *Ante*, at 711–712, n. 11. The pre-Guidelines probation practice is altogether inapt, since the governing statute explicitly provided for resentencing after violation, and specifically allowed the court to "impose any sentence which might originally have been imposed." 18 U. S. C. § 3653 (1982 ed.) (repealed). This makes it quite impossible for probation practice to support the Court's "broader point that a court's powers at the original sentencing are the baseline from which powers at resentencing are determined," *ante*, at 711, n. 11; all it proves is that they are the baseline where the statute says so. Indeed, the fact that the statute found it necessary to say so tends to contradict the Court's position.

Special parole, while more akin to supervised release than either parole or probation, hardly provides clear support for the Court's reading of § 3583(e)(3). In fact, the majority of Courts of Appeals have read the relevant statute regarding special parole, 21 U. S. C. § 841(c) (1982 ed.) (repealed), as not allowing reimposition of special parole in circumstances analogous to those at issue here. See *Manso* v. *Federal Detention Center*, 182 F. 3d 814, 817 (CA11 1999) (citing cases). The Court's reliance on the Parole Commission's 1977 interpretation of the special parole statute, see 28 CFR § 2.57(c) (1999), is misplaced. The principle that Congress is presumed to legislate in light of existing administrative interpretations does not stretch to cover an administrative interpretation of a statute dealing with a different subject, of recent vintage, and unsupported by judicial opinion. Cf. *Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998) (repetition of existing statutory language assumed to incorporate "uniform body of administrative and judicial precedent" that had "settled the meaning" of existing provision); *Haig* v. *Agee*, 453 U. S. 280, 297 (1981) (assuming congressional awareness of "longstanding administrative construction"). Further, some courts have found it unclear whether the Parole Commission's regulation itself envisions reimposition of special parole. See, *e. g.*, *Fowler* v. *United States Parole Commission*, 94 F. 3d 835, 841 (CA3 1996).

* * *

This is not an important case, since it deals with the interpretation of a statute that has been amended to eliminate, for the future, the issue we today resolve. But an institution that is careless in small things is more likely to be careless in large ones; and an institution that is willful in small things is almost certain to be willful in large ones. The fact that nothing but the Court's views of policy and "congressional purpose" supports today's judgment is a matter of great concern, if only because of what it tells district and circuit judges. The overwhelming majority of the Courts of Appeals—9 out of 11—notwithstanding what they might have viewed as the more desirable policy arrangement, reached the result unambiguously demanded by the statutory text. See *ante,* at 698, n. 2. Today's decision invites them to return to headier days of not-too-yore, when laws meant what judges knew they ought to mean. I dissent.

# PUBLIC LANDS COUNCIL ET AL. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 98–1991. Argued March 1, 2000—Decided May 15, 2000

The Taylor Grazing Act, *inter alia,* grants the Secretary of the Interior authority to divide the public rangelands into grazing districts, to specify the amount of grazing permitted in each district, and to issue grazing leases or permits to "settlers, residents, and other stock owners," 43 U. S. C. §§315, 315a, 315b; gives preference with respect to permits to "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights," §315b; and specifies that grazing privileges "shall be adequately safeguarded," but that the creation of a grazing district or the issuance of a permit does not create "any right, title, interest, or estate in or to the lands," *ibid.* Since 1938, conditions placed on grazing permits have reflected the grazing privileges' leasehold nature, and the grazing regulations in effect have preserved the Secretary's authority to (1) cancel a permit under certain circumstances, (2) reclassify and withdraw land from grazing to devote it to a more valuable or suitable use, and (3) suspend animal unit months (AUMs) of grazing privileges in the event of range depletion. Petitioners, ranching-related organizations, challenged several 1995 amendments to the regulations. The District Court found four of the new regulations unlawful. The Tenth Circuit reversed as to three of them, upholding regulations that (1) changed the definition of "grazing preference," 43 CFR §4100.0–5; (2) permitted those who are not "engaged in the livestock business" to qualify for grazing permits, §4110.1(a); and (3) granted the United States title to all future "permanent" range improvements, §4120.3–2.

*Held:* The regulatory changes do not exceed the Secretary's Taylor Grazing Act authority. Pp. 739–750.

(a) Section 4100.0–5's new definition of "grazing preference" does not violate 43 U. S. C. §315b's requirement that "grazing privileges" "be adequately safeguarded." Before its amendment, §4100.0–5 defined "grazing preference" as "the total number of [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee," but the 1995 version refers only to a priority, not to a specific number of AUMs, and it adds a new term, "permitted use," which refers to forage "allocated by, or under the guidance of an applicable land use plan." The new definitions do not exceed the Secretary's authority under § 315b. First, § 315b's words "so far as consistent with the purposes" of the Act and "issuance of a permit" creates no "right, title, interest, or estate" make clear that the ranchers' interest in permit stability is not absolute and that the Secretary is free reasonably to determine just how, and the extent to which, grazing privileges are to be safeguarded. Moreover, since Congress itself has directed development of land use plans, and their use in the allocation process, it is difficult to see how a definitional change that simply refers to using such plans could violate the Taylor Act by itself, without more. Given the broad discretionary powers that the Taylor Act grants the Secretary, the Act must be read as here granting him at least ordinary administrative leeway to assess "safeguard[ing]" in terms of the Act's other purposes and provisions. Second, the pre-1995 AUM system that petitioners seek to "safeguard" did not offer them anything like absolute security, for the Secretary had well-established pre-1995 authority to cancel, modify, or decline to review permits, including the power to do so pursuant to a land use plan. Third, the new definitional regulations by themselves do not automatically bring about a self-executing change that would significantly diminish the security of grazing privileges. The Interior Department represents that the new definitions merely clarify terminology. The new regulations do seem to tie grazing privileges to land use plans more explicitly than did the old. However, all Bureau of Land Management lands have been covered by land use plans for nearly 20 years, yet the ranchers have not provided a single example in which interaction of plan and permit has jeopardized or might jeopardize permit security. A particular land use plan might lead to a denial of privileges that the pre-1995 regulations would have provided, but the question here is whether the definition changes by themselves violate the Act's requirement that grazing privileges be "adequately safeguarded." They do not. Pp. 739–744.

(b) The deletion of the phrase "engaged in the livestock business" from § 4110.1(a) does not violate the statutory limitation to "stock owners." Section 315b, just two sentences after using "stock owners," gives preference to "landowners engaged in the livestock business." This indicates that Congress did not intend to make the phrases synonyms. Neither the Act's legislative history nor its basic purpose suggests an absolute limit to those engaged in the livestock business was intended by the term "stock owner." The ranchers' underlying concern is that the amendment is part of a scheme to end grazing on public lands by allowing individuals to acquire a few livestock, obtain a permit for conservation, and then effectively mothball the permit. However, the remaining regulations, for livestock grazing use or suspended use, do not encompass the situation that the ranchers describe. Pp. 745–748.

(c) Section 4120.3–2, which specifies that title to permanent range improvements, such as fences, wells, and pipelines, made pursuant to cooperative agreements with the Government shall be in the name of the United States, does not violate the Act. Nothing in the statute denies the Secretary authority reasonably to decide when or whether to grant title to those who make improvements. Any such person remains free to negotiate the terms upon which he will make those improvements, including how he might be compensated in the future for his work, either by the Government or by those granted a Government permit. Pp. 748–750.

167 F. 3d 1287, affirmed.

BREYER, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 750.

*Timothy S. Bishop* argued the cause for petitioners. With him on the briefs were *Steffen N. Johnson* and *Constance E. Brooks.*

*Deputy Solicitor General Kneedler* argued the cause for respondents. With him on the brief were *Solicitor General Waxman, Assistant Attorney General Schiffer, David C. Frederick, William B. Lazarus,* and *John D. Leshy.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Wyoming by *Gay Woodhouse*, Attorney General, *Thomas J. Davidson,* Deputy Attorney General, and *Theodore C. Preston,* Assistant Attorney General; for the Alameda Bookcliffs Ranch et al. by *Karen Budd-Falen* and *Jeffrey B. Teichert;* for the Association of Rangeland Consultants by *W. Alan Schroeder;* for the Farm Credit Institutions by *William G. Myers III* and *Marcy G. Glenn;* for the Northwest Mining Association by *William Perry Pendley* and *Steven J. Lechner;* for the Pacific Legal Foundation et al. by *M. Reed Hopper;* and for Congressman Don Young et al. by *William K. Kelley.*

Briefs of *amici curiae* urging affirmance were filed for the Natural Resources Defense Council et al. by *Thomas D. Lustig;* and for the Nature Conservancy by *W. Cullen Battle* and *Michael Dennis.*

JUSTICE BREYER delivered the opinion of the Court.

This case requires us to interpret several provisions of the 1934 Taylor Grazing Act, 48 Stat. 1269, 43 U. S. C. § 315 *et seq.* The petitioners claim that each of three grazing regulations, 43 CFR §§ 4100.0–5, 4110.1(a), and 4120.3–2 (1998), exceeds the authority that this statute grants the Secretary of the Interior. We disagree and hold that the three regulations do not violate the Act.

## I

We begin with a brief description of the Act's background, provisions, and related administrative practice.

### A

The Taylor Grazing Act's enactment in 1934 marked a turning point in the history of the western rangelands, the vast, dry grasslands and desert that stretch from western Nebraska, Kansas, and Texas to the Sierra Nevada. Ranchers once freely grazed livestock on the publicly owned range as their herds moved from place to place, searching for grass and water. But the population growth that followed the Civil War eventually doomed that unregulated economic freedom.

A new era began in 1867 with the first successful long drive of cattle north from Texas. Cowboys began regularly driving large herds of grazing cattle each year through thousands of miles of federal lands to railheads like Abilene, Kansas. From there or other towns along the rail line, trains carried live cattle to newly opened eastern markets. The long drives initially brought high profits, which attracted more ranchers and more cattle to the land once home only to Indian tribes and buffalo. Indeed, an early-1880's boom in the cattle market saw the number of cattle grazing the Great Plains grow well beyond 7 million. See R. White, "It's Your Misfortune and None of My Own": A History of the American West 223 (1991); see generally E. Osgood, The Day of the

Cattleman 83–113 (1929); W. Webb, The Great Plains 205–268 (1931).

But more cattle meant more competition for ever-scarcer water and grass. And that competition was intensified by the arrival of sheep in the 1870's. Many believed that sheep were destroying the range, killing fragile grass plants by cropping them too closely. The increased competition for forage, along with droughts, blizzards, and growth in homesteading, all aggravated natural forage scarcity. This led, in turn, to overgrazing, diminished profits, and hostility among forage competitors—to the point where violence and "wars" broke out, between cattle and sheep ranchers, between ranchers and homesteaders, and between those who fenced and those who cut fences to protect an open range. See W. Gard, Frontier Justice 81–149 (1949). These circumstances led to calls for a law to regulate the land that once was free.

The calls began as early as 1878 when the legendary southwestern explorer, Major John Wesley Powell, fearing water monopoly, wrote that ordinary homesteading laws would not work and pressed Congress to enact "a general law . . . to provide for the organization of pasturage districts." Report on the Lands of the Arid Region of the United States, H. Exec. Doc. No. 73, 45th Cong., 2d Sess., 28 (1878). From the end of the 19th century on, Members of Congress regularly introduced legislation of this kind, often with Presidential support. In 1907, President Theodore Roosevelt reiterated Powell's request and urged Congress to pass laws that would "provide for Government control of the public pasture lands of the West." S. Doc. No. 310, 59th Cong., 2d Sess., 5 (1907). But political opposition to federal regulation was strong. President Roosevelt attributed that opposition to "those who do not make their homes on the land, but who own wandering bands of sheep that are driven hither and thither to eat out the land and render it worthless for the real home maker"; along with "the men who have already obtained control of great areas of the public land . . . who object . . . because it will break the control that these few big men now have over the lands which they do not actually own." *Ibid.* Whatever the opposition's source, bills reflecting Powell's approach did not become law until 1934.

By the 1930's, opposition to federal regulation of the federal range had significantly diminished. Population growth, forage competition, and inadequate range control all began to have consequences both serious and apparent. With a horrifying drought came 'dawns without day' as dust storms swept the range. The devastating storms of the Dust Bowl were in the words of one Senator "the most tragic, the most impressive lobbyist, that ha[s] ever come to this Capitol." 79 Cong. Rec. 6013 (1935). Congress acted; and on June 28, 1934, President Franklin Roosevelt signed the Taylor Grazing Act into law.

### B

The Taylor Act seeks to "promote the highest use of the public lands." 43 U. S. C. § 315. Its specific goals are to "stop injury" to the lands from "overgrazing and soil deterioration," to "provide for their use, improvement and development," and "to stabilize the livestock industry dependent on the public range." 48 Stat. 1269. The Act grants the Secretary of the Interior authority to divide the public rangelands into grazing districts, to specify the amount of grazing permitted in each district, to issue leases or permits "to graze livestock," and to charge "reasonable fees" for use of the land. 43 U. S. C. §§ 315, 315a, 315b. It specifies that preference in respect to grazing permits "shall be given . . . to those within or near" a grazing district "who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights." § 315b. And, as particularly relevant here, it adds:

> "So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and ac-

> knowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands." *Ibid.*

### C

The Taylor Act delegated to the Interior Department an enormous administrative task. To administer the Act, the Department needed to determine the bounds of the public range, create grazing districts, determine their grazing capacity, and divide that capacity among applicants. It soon set bounds encompassing more than 140 million acres, and by 1936 the Department had created 37 grazing districts, see Department of Interior Ann. Rep. 15 (1935); W. Calef, Private Grazing and Public Lands 58–59 (1960). The Secretary then created district advisory boards made up of local ranchers and called on them for further help. See 2 App. 809–811 (Rules for Administration of Grazing Districts (Mar. 2, 1936)). Limited department resources and the enormity of the administrative task made the boards "the effective governing and administrative body of each grazing district." Calef, *supra*, at 60; accord, P. Foss, Politics and Grass 199–200 (1960).

By 1937 the Department had set the basic rules for allocation of grazing privileges. Those rules recognized that many ranchers had long maintained herds on their own private lands during part of the year, while allowing their herds to graze farther afield on public land at other times. The rules consequently gave a first preference to owners of stock who also owned "base property," *i. e.*, private land (or water rights) sufficient to support their herds, *and* who had grazed the public range during the five years just prior to the Taylor Act's enactment. See 2 App. 818–819 (Rules for Administration of Grazing Districts (June 14, 1937)). They gave a second preference to other owners of nearby "base" property lacking prior use. *Ibid.* And they gave a third preference to stock owners without base property, like the nomadic sheep herder. *Ibid.* Since lower preference categories divided capacity left over after satisfaction of all higher preference claims, this system, in effect, awarded grazing privileges to owners of land or water. See Foss, *supra,* at 63 (quoting Grazing Division Director F. R. Carpenter's remarks that grazing privileges are given to ranchers "not as individuals, nor as owners of livestock," but to "build up [the] lands and give them stability and value").

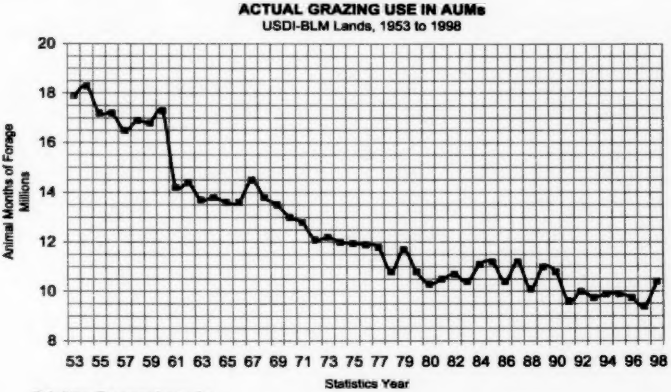
As grazing allocations were determined, the Department would issue a permit measuring grazing privileges in terms of "animal unit months" (AUMs), *i. e.,* the right to obtain the forage needed to sustain one cow (or five sheep) for one month. Permits were valid for up to 10 years and usually renewed, as suggested by the Act. See 43 U. S. C. § 315b; Public Land Law Review Commission, One Third of the Nation's Land 109 (1970). But the conditions placed on permits reflected the leasehold nature of grazing privileges, consistent with the fact that Congress had made the Secretary the landlord of the public range and basically made the grant of grazing privileges discretionary. The grazing regulations in effect from 1938 to the present day made clear that the Department retained the power to modify, fail to renew, or cancel a permit or lease for various reasons.

First, the Secretary could cancel permits if, for example, the permit holder persistently overgrazed the public lands, lost control of the base property, failed to use the permit, or failed to comply with the Range Code. See, *e. g.,* 43 CFR §§ 160.26(a)–(f) (1938); Department of Interior, Federal Range Code §§ 6(c)(6), (7), (10) (1942) (hereinafter 1942 Range Code); 43 CFR §§ 161.6(c)(6)–(7), (10)–(12) (1955); 43 CFR §§ 4115.2–1(d), (e)(7)–(11) (1964); 43 CFR §§ 4115.2–1(d) (e)(7)–(11) (1977); 43 CFR § 4170.1–2 (1994); 43 CFR § 4170.1–2 (1998). Second, the Secretary, consistent first with 43 U. S. C. § 315f, and later the land use planning mandated by 43 U. S. C. § 1712 (discussed *infra,* at 737–738), was authorized to reclassify and withdraw land from grazing altogether and devote it to a more valuable or suitable use. See, *e. g.*, 43 CFR § 160.22 (1938); 1942 Range Code § 6(c)(4); 43 CFR § 161.6(c)(5) (1955); 43 CFR §§ 4111.4–2(f), 4115.2–1(e)(6) (1964); 43 CFR §§ 4111.4–3(f), 4115.2–1(e)(6) (1977); 43 CFR § 4110.4–2(a) (1994); 43 CFR § 4110.4–2(a) (1998). Third, in the event of range depletion, the Secretary maintained a separate authority, not to take areas of land out of grazing use altogether as above, but to reduce the amount of grazing allowed on that land, by suspending AUMs of grazing privileges "in whole or in part," and "for such time as necessary." 43 CFR § 4115.2–1(e)(5) (1964); see also 43 CFR § 160.30 (1938) (reservation (b)); 1942 Range Code § 6(c)(8); 43 CFR § 161.4(8) (1955); 43 CFR §§ 4111.4–3, 4115.2–1(e)(5) (1977); 43 CFR § 4110.3–2 (1994); 43 CFR § 4110.3–2 (1998).

Indeed, the Department so often reduced individual permit AUM allocations under this last authority that by 1964 the regulations had introduced the notion of "active AUMs," *i. e.*, the AUMs that a permit *initially* granted *minus* the AUMs that the department had "suspended" due to diminished range capacity. Thus, three ranchers who had initially received, say, 3,000, 2,000, and 1,000 AUMs respectively, might find that they could use only two-thirds of that number because a 33% reduction in the district's grazing capacity had led the Department to "suspend" one-third of each allocation. The "active/suspended" system assured each rancher, however, that any capacity-related reduction would take place proportionately among permit holders, see 43 CFR § 4111.4–2(a)(3) (1964), and that the Department would try to restore grazing privileges proportionately should the district's capacity later increase, see § 4111.4–1.

In practice, active grazing on the public range declined dramatically and steadily (from about 18 million to about

10 million AUMs between 1953 and 1998) as the following chart shows:



Brief for Respondents 9a.

Despite the reductions in grazing, and some improvements following the passage of the Taylor Act, see App. 374–379 (Department of Interior, 50 Years of Public Land Management 1934–1984), the range remained in what many considered an unsatisfactory condition. In 1962, a congressionally mandated survey found only 16.6% of the range in excellent or good condition, 53.1% in fair condition, and 30.3% in poor condition. Department of Interior Ann. Rep. 62 (1962). And in 1978 Congress itself determined that "vast segments of the public rangelands are . . . in an unsatisfactory condition." 92 Stat. 1803 (codified as 43 U. S. C. § 1901(a)(1)).

## D

In the 1960's, as the range failed to recover, the Secretary of the Interior increased grazing fees by more than 50% (from 19 cents to 30 cents per AUM/year), thereby helping to capture a little more of the economic costs that grazing imposed upon the land. Department of Interior Ann. Rep. 66 (1963). And in 1976, Congress enacted a new law, the

Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, 43 U. S. C. § 1701 *et seq.*, which instructed the Interior Department to develop districtwide land use plans based upon concepts of "multiple use" (use for various purposes, such as recreation, range, timber, minerals, watershed, wildlife and fish, and natural and scenic, scientific, and historical usage), § 1702(c), and "sustained yield" (regular renewable resource output maintained in perpetuity), § 1702(h). The FLPMA strengthened the Department's existing authority to remove or add land from grazing use, allowing such modification pursuant to a land use plan, §§ 1712, 1714, while specifying that existing grazing permit holders would retain a "first priority" for renewal so long as the land use plan continued to make land "available for domestic livestock grazing," § 1752(c).

In 1978, the Department's grazing regulations were, in turn, substantially amended to comply with the new law. See 43 Fed. Reg. 29067. As relevant here, the 1978 regulations tied permit renewal and validity to the land use planning process, giving the Secretary the power to cancel, suspend, or modify grazing permits due to increases or decreases in grazing forage or acreage made available pursuant to land planning. See 43 CFR §§ 4110.3–2(b), 4110.4–2 (1978); see also 43 CFR § 4110.4–2 (1994); 43 CFR § 4110.4–2 (1998).

That same year Congress again increased grazing fees for the period 1979 to 1986. See Public Rangelands Improvement Act of 1978, 43 U. S. C. § 1905. However neither of the two Acts from the 1970's significantly modified the particular provisions of the Taylor Act at issue in this case.

### E

This case arises out of a 1995 set of Interior Department amendments to the federal grazing regulations. 60 Fed. Reg. 9894 (1995) (Final Rule). The amendments represent a stated effort to "accelerate restoration" of the rangeland, make the rangeland management program "more compatible with ecosystem management," "streamline certain administrative functions," and "obtain for the public fair and reasonable compensation for the grazing of livestock on public lands." 58 Fed. Reg. 43208 (1993) (Proposed Rule). The amendments in final form emphasize individual "stewardship" of the public land by increasing the accountability of grazing permit holders; broaden membership on the district advisory boards; change certain title rules; and change administrative rules and practice of the Bureau of Land Management to bring them into closer conformity with related Forest Service management practices. See 60 Fed. Reg. 9900–9906 (1995).

Petitioners Public Lands Council and other nonprofit ranching-related organizations with members who hold grazing permits brought this lawsuit against the Secretary and other defendants in Federal District Court, challenging 10 of the new regulations. The court found 4 of 10 unlawful. 929 F. Supp. 1436, 1450–1451 (Wyo. 1996). The Court of Appeals reversed the District Court in part, upholding three of the four. 167 F. 3d 1287, 1289 (CA10 1999). Those three (which we shall describe further below) (1) change the definition of "grazing preference"; (2) permit those who are not "engaged in the livestock business" to qualify for grazing permits; and (3) grant the United States title to all future "permanent" range improvements. One judge on the Court of Appeals dissented in respect to the Secretary's authority to promulgate the first and the third regulations. See *id.*, at 1309–1318. We granted certiorari to consider the ranchers' claim that these three regulatory changes exceed the authority that the Taylor Act grants the Secretary. 528 U. S. 926 (1999).

## II

### A

The ranchers attack the new "grazing preference" regulations first and foremost. Their attack relies upon the provision in the Taylor Act stating that "grazing privileges recognized and acknowledged shall be adequately safeguarded . . . ." 43 U. S. C. § 315b. Before 1995 the regulations defined the term "grazing preference" in terms of the *AUM-denominated amount* of grazing privileges that a permit granted. The regulations then defined "grazing preference" as

> "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 CFR § 4100.0–5 (1994).

The 1995 regulations changed this definition, however, so that it now no longer refers to grazing privileges "apportioned," nor does it speak in terms of AUMs. The new definition defines "grazing preference" as

> "a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee." 43 CFR § 4100.0–5 (1995).

The new definition "omits reference to a specified quantity of forage." 60 Fed. Reg. 9921 (1995). It refers only to a priority, not to a specific number of AUMs attached to a base property. But at the same time the new regulations add a new term, "permitted use," which the Secretary defines as

> "the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs." 43 CFR § 4100.0–5 (1995).

This new "permitted use," like the old "grazing preference," is defined in terms of allocated rights, and it refers to AUMs. But this new term as defined refers, not to a rancher's forage priority, but to forage "allocated by, or under the guidance of *an applicable land use plan.*" *Ibid.* (emphasis added). And therein lies the ranchers' concern.

The ranchers refer us to the administrative history of Taylor Act regulations, much of which we set forth in Part I. In the ranchers' view, history has created expectations in respect to the security of "grazing privileges"; they have relied upon those expectations; and the statute requires the Secretary to "safeguar[d]" that reliance. Supported by various farm credit associations, they argue that defining their privileges in relation to land use plans will undermine that security. They say that the content of land use plans is difficult to predict and easily changed. Fearing that the resulting uncertainty will discourage lenders from taking mortgages on ranches as security for their loans, they conclude that the new regulations threaten the stability, and possibly the economic viability, of their ranches, and thus fail to "safeguard" the "grazing privileges" that Department regulations previously "recognized and acknowledged." Brief for Petitioners 22–23.

We are not persuaded by the ranchers' argument for three basic reasons. First, the statute qualifies the duty to "safeguard" by referring directly to the Act's various goals and the Secretary's efforts to implement them. The full subsection says:

> "*So far as consistent with the purposes and provisions of this subchapter*, grazing privileges recognized and acknowledged shall be adequately safeguarded, *but* the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall *not* create any right, title, interest or estate in or to the lands." 43 U. S. C. § 315b (emphasis added).

The words "so far as consistent with the purposes . . . of this subchapter" and the warning that "issuance of a permit" creates no "right, title, interest or estate" make clear that the ranchers' interest in permit stability cannot be absolute;

and that the Secretary is free reasonably to determine just how, and the extent to which, "grazing privileges" shall be safeguarded, in light of the Act's basic purposes. Of course, those purposes include "stabiliz[ing] the livestock industry," but they also include "stop[ping] injury to the public grazing lands by preventing overgrazing and soil deterioration," and "provid[ing] for th[e] orderly use, improvement, and development" of the public range. 48 Stat. 1269; see *supra,* at 733.

Moreover, Congress itself has directed development of land use plans, and their use in the allocation process, in order to preserve, improve, and develop the public rangelands. See 43 U. S. C. §§ 1701(a)(2), 1712. That being so, it is difficult to see how a definitional change that simply refers to the use of such plans could violate the Taylor Act by itself, without more. Given the broad discretionary powers that the Taylor Act grants the Secretary, we must read that Act as here granting the Secretary at least ordinary administrative leeway to assess "safeguard[ing]" in terms of the Act's other purposes and provisions. Cf. §§ 315, 315a (authorizing Secretary to establish grazing districts "*in his discretion*" (emphasis added), and to "make provision for protection, administration, regulation, and improvement of such grazing districts").

Second, the pre-1995 AUM system that the ranchers seek to "safeguard" did not offer them anything like absolute security—not even in respect to the proportionate shares of grazing land privileges that the "active/suspended" system suggested. As discussed above, the Secretary has long had the power to reduce an individual permit's AUMs or cancel the permit if the permit holder did not use the grazing privileges, did not use the base property, or violated the Range Code. See *supra,* at 735 (collecting CFR citations 1938–1998). And the Secretary has always had the statutory authority under the Taylor Act and later FLPMA to reclassify and withdraw rangeland from grazing use, see 43 U. S. C.

§ 315f (authorizing Secretary, "in his discretion, to examine and classify any lands . . . which are more valuable or suitable for the production of agricultural crops . . . or any other use than [grazing]"); §§ 1712, 1752(c) (authorizing renewal of permits "so long as the lands . . . remain available for domestic livestock grazing *in accordance with land use plans*" (emphasis added)). The Secretary has consistently reserved the authority to cancel or modify grazing permits accordingly. See *supra,* at 735–736 (collecting CFR citations). Given these well-established pre-1995 Secretarial powers to cancel, modify, or decline to renew individual permits, *including the power to do so pursuant to the adoption of a land use plan,* the ranchers' diminishment-of-security point is at best a matter of degree.

Third, the new definitional regulations by themselves do not automatically bring about a self-executing change that would significantly diminish the security of granted grazing privileges. The Department has said that the new definitions do "not cancel preference," and that any change is "merely a clarification of terminology." 60 Fed. Reg. 9922 (1995). It now assures us through the Solicitor General that the definitional changes "preserve all elements of preference" and "merely clarify the regulations within the statutory framework." See Brief in Opposition 13, 14.

The Secretary did consider making a more sweeping change by eliminating the concept of "suspended use"; a change that might have more reasonably prompted the ranchers' concerns. But after receiving comments, he changed his mind. See 59 Fed. Reg. 14323 (1994). The Department has instead said that "suspended" AUMs will

> "continue to be recognized and have a priority for additional grazing use within the allotment. Suspended use provides an important accounting of past grazing use for the ranching community and is an insignificant administrative workload to the agency." Bureau of Land Man-

agement, Rangeland Reform '94: Final Environmental Impact Statement 144 (1994).

Of course, the new definitions seem to tie grazing privileges to land use plans more explicitly than did the old. But, as we have pointed out, the Secretary has since 1976 had the authority to use land use plans to determine the amount of permissible grazing, 43 U. S. C. § 1712. The Secretary also points out that since development of land use plans began nearly 20 years ago, "all BLM lands in the lower 48 States are covered by land use plans," and "all grazing permits in those States have now been issued or renewed in accordance with such plans, or must now conform to them." Brief for Respondents 26. Yet the ranchers have not provided us with a single example in which interaction of plan and permit has jeopardized or might yet jeopardize permit security. An *amicus* brief filed by a group of Farm Credit Institutions says that the definitional change will "threate[n]" their "lending policies." Brief for Farm Credit Institutions as *Amicus Curiae* 3. But they do not explain *why* that is so, nor do they state that the new definitions will, in fact, lead them to stop lending to ranchers.

We recognize that a particular land use plan could change pre-existing grazing allocation in a particular district. And that change might arguably lead to a denial of grazing privileges that the pre-1995 regulations would have provided. But the affected permit holder remains free to challenge such an individual effect on grazing privileges, and the courts remain free to determine its lawfulness in context. We here consider only whether the changes in the definitions by themselves violate the Taylor Act's requirement that recognized grazing privileges be "adequately safeguarded." Given the leeway that the statute confers upon the Secretary, the less-than-absolute pre-1995 security that permit holders enjoyed, and the relatively small differences that the new definitions create, we conclude that the new definitions do not violate that law.

### B

The ranchers' second challenge focuses upon a provision of the Taylor Act that limits issuance of permits to "settlers, residents, and other *stock owners* . . . ." 43 U. S. C. § 315b (emphasis added). In 1936, the Secretary, following this requirement, issued a regulation that limited eligibility to those who "ow[n] livestock." 2 App. 808 (Rules for Administration of Grazing Districts (Mar. 2, 1936)). But in 1942, the Secretary changed the regulation's wording to limit eligibility to those "engaged in the livestock business," 1942 Range Code § 3(a), and so it remained until 1994. The new regulation eliminates the words "engaged in the livestock business," thereby seeming to make eligible otherwise qualified applicants even if they do not engage in the livestock business. See 43 CFR § 4110.1(a) (1995).

The new change is not as radical as the text of the new regulation suggests. The new rule deletes the entire phrase "engaged in the livestock business" from § 4110.1, and seems to require only that an applicant "own or control land or water base property . . . ." *Ibid.* But the omission, standing alone, does not render the regulation facially invalid, for the regulation cannot change the statute, and a regulation promulgated to guide the Secretary's discretion in exercising his authority under the Act need not also restate all related statutory language. Ultimately it is *both* the Taylor Act and the regulations promulgated thereunder that constrain the Secretary's discretion in issuing permits. The statute continues to limit the Secretary's authorization to issue permits to "bona fide settlers, residents, and *other stock owners.*" 43 U. S. C. § 315b (emphasis added).

Nor will the change necessarily lead to widespread issuance of grazing permits to "stock owners" who are not in the livestock business. Those in the business continue to enjoy a preference in the issuance of grazing permits. The same section of the Taylor Act mandates that the Secretary accord a preference to "landowners engaged in the livestock business, bona fide occupants or settlers." *Ibid.* And this statutory language has been extremely important in practice. See *supra,* at 734–735.

The ranchers nonetheless contend that the deletion of the term "engaged in the livestock business" violates the statutory limitation to "stock owners" in § 315b. The words "stock owner," they say, meant "commercial stock owner" in 1934, and a commercial stock owner is not simply one who owns livestock, but one who engages in the business. Hence, they argue, the Secretary lacks the authority to allow those who are not engaged in the business to apply for permits.

The words "stock owner" and "stock owner engaged in the livestock business," however, are not obvious synonyms. And we have found no convincing indication that Congress intended that we treat them as such. Just two sentences after using the words "stock owner," Congress said that, among those eligible for permits (*i. e.,* stock owners), preference should be given to "landowners *engaged in the livestock business,* bona fide occupants or settlers, or owners of water or water rights." § 315b (emphasis added). Why would Congress add the words "engaged in the livestock business" if (as the ranchers' argument implies) they add nothing? Cf. *United States* v. *Nordic Village, Inc.,* 503 U. S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect"). The legislative history to which the ranchers point shows that Congress expected that ordinarily permit holders would be ranchers, who do engage in the livestock business, but does not show any such absolute requirement. See, *e. g.,* H. R. Rep. No. 903, 73d Cong., 2d Sess., 2 (1934); Hearings on H. R. 2835 and H. R. 6462 before the House Committee on the Public Lands, 73d Cong., 1st and 2d Sess., 96 (1933–1934); Hearings on H. R. 6462 before the Senate Committee on Public Lands and Surveys, 73d Cong., 2d Sess., 40 (1934). Nor does the statute's basic purpose require that the two sets of different words mean the same thing. Congress could reasonably have written the statute to mandate a preference in the granting of permits to those actively involved in the livestock business, while not absolutely excluding the possibility of granting permits to others. The Secretary has not exceeded his powers under the statute.

The ranchers' underlying concern is that the qualifications amendment is part of a scheme to end livestock grazing on the public lands. They say that "individuals or organizations owning small quantities of stock [will] acquire grazing permits, even though they intend not to graze at all or to graze only a nominal number of livestock—all the while excluding others from using the public range for grazing." Brief for Petitioners 47–48. The new regulations, they charge, will allow individuals to "acquire a few livestock, . . . obtain a permit for what amounts to a conservation purpose and then effectively mothball the permit." *Id.*, at 48.

But the regulations do not allow this. The regulations specify that regular grazing permits will be issued for livestock grazing or suspended use. See 43 CFR §§4130.2(a), 4130.2(g) (1998). New regulations allowing issuance of permits for conservation use were held unlawful by the Court of Appeals, see 167 F. 3d, at 1307–1308, and the Secretary did not seek review of that decision.

Neither livestock grazing use nor suspended use encompasses the situation that the ranchers describe. With regard to the former, the regulations state that permitted livestock grazing "*shall be based* upon the amount of forage available for livestock grazing as established in the land use plan . . . ." 43 CFR §4110.2–2(a) (1998) (emphasis added). Permitted livestock use is not simply a symbolic upper limit. Under the regulations, a permit holder is expected to make substantial use of the permitted use set forth in the grazing permit. For example, the regulations prohibit a permit holder from "[f]ailing to make substantial grazing use as authorized for 2 consecutive fee years." §4140.1(a)(2). If a permit holder does fail to make substantial use as authorized in his permit for two consecutive years, the Secretary is authorized to cancel from the grazing permit that portion of permitted use that the permit holder has failed to use. See § 4170.1–2. On the basis of these regulations, the Secretary has represented to the Court that "[a] longstanding rule requires that a grazing permit be used for grazing." Brief for Respondents 43, n. 25. Suspended use, in turn, is generally imposed by the Secretary in response to changing range conditions. See *supra,* at 736. Permittees may also apply to place forage in "[t]emporary nonuse" for financial reasons, but the Secretary must approve such nonuse on an annual basis and may not grant it for more than three consecutive years. 43 CFR § 4130.2(g)(2) (1998). A successful temporary nonuse application, moreover, does not necessarily take the land out of grazing use—the Secretary may allocate to others the forage temporarily made available via nonrenewable permit. See §§ 4130.2(h), 4130.6–2. In short, nothing in the change to § 4110.1(a) undermines the Taylor Act's requirement that the Secretary grant permits "to graze livestock." 43 U. S. C. § 315b.

## C

The ranchers' final challenge focuses upon a change in the way the new rules allocate ownership of range improvements, such as fencing, well drilling, or spraying for weeds on the public lands. The Taylor Act provides that permit holders may undertake range improvements pursuant to (1) a cooperative agreement with the United States, or (2) a range improvement permit. 43 U. S. C. § 315c; see 43 CFR §§ 4120.3–2, 4120.3–3 (1998). The pre-1995 regulations applicable to cooperative agreements gave the United States full title to "nonstructural" improvements, such as spraying for weeds, and to "non-removable improvements," such as wells. 43 CFR § 4120.3–2 (1994). But for "structural or removable improvements," such as fencing, stock tanks, or pipelines, the regulations shared title between the permit holder and the United States "in proportion to the actual amount of the respective contribution to the initial construction." *Ibid.* And for range improvements made pursuant to permit, the pre-1995 regulations gave the permittee "title to removable range improvements." § 4120.3–3(b).

The 1995 regulations change the title rules for range improvements made pursuant to a cooperative agreement, but not the rules for improvements made pursuant to permit. For cooperative agreements, they specify that "title to permanent range improvements" (authorized in the future) "such as fences, wells, and pipelines . . . shall be in the name of the United States." 43 CFR § 4120.3–2(b) (1995).

The ranchers argue that this change violates 43 U. S. C. § 315c, which says:

> "No permit shall be issued which shall entitle the permittee to the use of such [range] improvements constructed *and owned* by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements . . . ." (Emphasis added.)

In their view, the word "owned" foresees ownership by a "prior occupant" of at least some such improvements, a possibility they say is denied by the new rule mandating blanket Government ownership of permanent range improvements.

The Secretary responds that, since the statute gives him the power to *authorize* range improvements pursuant to a cooperative agreement—a greater power, § 315c—he also has the power to set the terms of title ownership to such improvements—a lesser power—just like any landlord. See R. Schoshinski, American Law of Landlord and Tenant § 5:31 (1980) (ownership of tenant improvements is a matter open to negotiation with landlord); H. Bronson, A Treatise on the Law of Fixtures § 40 (1904); 2 J. Taylor, A Treatise on the American Law of Landlord and Tenant § 554, pp. 164–166 (1887). Under this reading, the subsequent statutory provision relating to "ownership" simply provides for compensation by some future permit holder *in the event* that the Secretary decides to grant title.

As detailed above, the Secretary did grant ownership rights to range improvements under certain circumstances prior to 1995. We see nothing in the statute that prevents him from changing his mind in respect to the future. And the Secretary has now changed his mind for reasons of administrative convenience and because what he takes as the original purpose of this provision (assuring that, in 1934, ranchers would pay compensation to nomadic sheep herders) is no longer important. In any event, the provision retains even the "contemplation of ownership" meaning stressed by the ranchers, for permit holders may still "own" removable range improvements, such as "corrals, creep feeders, and loading chutes, and temporary structural improvements such as troughs for hauled water," 43 CFR § 4120.3–3(b) (1995), which could be transferred to a new permit holder and thus compel compensation under § 315f.

In short, we find nothing in the statute that denies the Secretary authority reasonably to decide when or whether to grant title to those who make improvements. And any such person remains free to negotiate the terms upon which he will make those improvements irrespective of where title formally lies, including how he might be compensated in the future for the work he had done, either by the Government directly or by those to whom the Government later grants a permit. Cf. 43 U. S. C. § 1752(g) (requiring the United States to pay compensation to a permittee for his "interest" in range improvements if it cancels a permit).

The judgment of the Court of Appeals is

*Affirmed.*

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion. I write separately to make the following observations concerning the Court's decision.

First, in Part II–A, the Court holds that the Secretary did not exceed his authority under the Taylor Grazing Act by promulgating the new "grazing preference" and "permitted use" rules. I agree with that holding but would place special emphasis on the Court's third reason for rejecting petitioners' facial challenge to the regulations. Petitioners have not shown how the new regulations themselves—rather than specific actions the Secretary might take pursuant to those regulations—violate the Taylor Grazing Act's requirement that "grazing privileges recognized and acknowledged . . . be adequately safeguarded." 43 U. S. C. § 315b. It is of particular importance, as the Court notes, *ante*, at 743, that the Secretary has assured us that the new regulations do not in actual practice "alter the active use/suspended use formula in grazing permits" and that " 'present suspended use would continue to be recognized and have a priority for additional grazing use within the allotment.' " Brief for Respondents 22 (quoting Bureau of Land Management, Rangeland Reform '94: Final Environmental Impact Statement 144 (1994)). For these reasons, petitioners' facial challenge to the regulations must fail. Should a permit holder find, however, that the Secretary's specific application of the new regulations deviates from the above assurances and in the process deprives the permit holder of grazing privileges to such an extent that the Secretary's conduct can be termed a failure to adequately safeguard such privileges, the permit holder may bring an as-applied challenge to the Secretary's action at that time. The Court's holding today in no way forecloses such a challenge. See *ante*, at 744 ("[T]he affected permit holder remains free to challenge such an individual [denial of] grazing privileges, and the courts remain free to determine its lawfulness in context").

Second, it is important to note that the Court's decision today only rejects petitioners' claim that the 1995 regulations exceed the Secretary's authority under the Taylor Grazing Act. We are not presented in this case with a claim under the Administrative Procedure Act (APA), 5 U. S. C.

§ 706(2)(A), that the Secretary acted arbitrarily and capriciously in promulgating the new regulations. Under our decision in *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U. S. 29, 42 (1983), an agency that departs from its previous rules will be found to have acted arbitrarily and capriciously if it fails "to supply a reasoned analysis for the change . . . ." Although petitioners pressed precisely such an "arbitrary and capricious" challenge before the District Court, for whatever reason, they chose not to raise it before this Court. Regardless of whether the "arbitrary and capricious" claim remains open to these permit holders, the Court's decision does not foreclose such an APA challenge generally by permit holders affected by the 1995 regulations.

With these understandings, I join the Court's opinion.

# OHLER *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–9828. Argued March 20, 2000—Decided May 22, 2000

Petitioner Ohler was tried on drug charges. The Federal District Court granted the Government's motion *in limine* to admit her prior felony drug conviction as impeachment evidence under Federal Rule of Evidence 609(a)(1). Ohler testified at trial and admitted the prior conviction on direct examination. The jury convicted her. In affirming, the Ninth Circuit rejected her challenge to the District Court's *in limine* ruling, holding that she waived her objection by introducing the evidence during her direct examination.

*Held:* A defendant who pre-emptively introduces evidence of a prior conviction on direct examination may not challenge the admission of such evidence on appeal. Ohler attempts to avoid the well-established commonsense principle that a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted by invoking Federal Rules of Evidence 103 and 609. However, neither Rule addresses the question at issue here. She also argues that applying such a waiver rule in this situation would compel a defendant to forgo the tactical advantage of pre-emptively introducing the conviction in order to appeal the *in limine* ruling. But both the Government and the defendant in a criminal trial must make choices as the trial progresses. Ohler's submission would deny to the Government its usual right to choose, after she testifies, whether or not to use her prior conviction against her. She seeks to short-circuit that decisional process by offering the conviction herself (and thereby removing the sting) and still preserve its admission as a claim of error on appeal. But here she runs into the position taken by the Court in *Luce* v. *United States*, 469 U. S. 38, 41, that any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. Only when the Government exercises its option to elicit the testimony is an appellate court confronted with a case where, under normal trial rules, the defendant can claim the denial of a substantial right if in fact the district court's *in limine* ruling proved to be erroneous. Finally, applying this rule to Ohler's situation does not unconstitutionally burden her right to testify, because the rule does not prevent her from taking the stand and presenting any admissible testimony she chooses. Pp. 755–760.

169 F. 3d 1200, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 760.

*Benjamin L. Coleman*, by appointment of the Court, 528 U. S. 984, argued the cause for petitioner. With him on the briefs was *Mario G. Conte.*

*Barbara McDowell* argued the cause for the United States. With her on the brief were *Solicitor General Waxman, Assistant Attorney General Robinson, Deputy Solicitor General Dreeben,* and *Jonathan L. Marcus.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner, Maria Ohler, was arrested and charged with importation of marijuana and possession of marijuana with the intent to distribute. The District Court granted the Government's motion *in limine* seeking to admit evidence of her prior felony conviction as impeachment evidence under Federal Rule of Evidence 609(a)(1). Ohler testified at trial and admitted on direct examination that she had been convicted of possession of methamphetamine in 1993. The jury convicted her of both counts, and the Court of Appeals for the Ninth Circuit affirmed. We agree with the Court of Appeals that Ohler may not challenge the *in limine* ruling of the District Court on appeal.

Maria Ohler drove a van from Mexico to California in July 1997. As she passed through the San Ysidro Port of Entry, a customs inspector noticed that someone had tampered with one of the van's interior panels. Inspectors searched the van and discovered approximately 81 pounds of marijuana. Ohler was arrested and charged with importation of marijuana and possession of marijuana with the intent to distribute. Before trial, the Government filed motions *in limine* seeking to admit Ohler's prior felony conviction as character evidence under Federal Rule of Evidence 404(b) and as impeachment evidence under Rule 609(a)(1). The District Court denied the motion to admit the conviction as character evidence, but reserved ruling on whether the conviction could be used for impeachment purposes. On the first day of trial, the District Court ruled that if Ohler testified, evidence of her prior conviction would be admissible under Rule 609(a)(1). App. 97–98. She testified in her own defense, denying any knowledge of the marijuana. She also admitted on direct examination that she had been convicted of possession of methamphetamine in 1993. The jury found Ohler guilty of both counts, and she was sentenced to 30 months in prison and 3 years' supervised release. *Id.*, at 140–141.

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**Jody Manier Kris* and *Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

On appeal, Ohler challenged the District Court's *in limine* ruling allowing the Government to use her prior conviction for impeachment purposes. The Court of Appeals for the Ninth Circuit affirmed, holding that Ohler waived her objection by introducing evidence of the conviction during her direct examination. 169 F. 3d 1200 (1999). We granted certiorari to resolve a conflict among the Circuits regarding whether appellate review of an *in limine* ruling is available in this situation. 528 U. S. 950 (1999). See *United States* v. *Fisher*, 106 F. 3d 622 (CA5 1997) (allowing review); *United States* v. *Smiley*, 997 F. 2d 475 (CA8 1993) (holding objection waived). We affirm.

Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted. See 1 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 103.14, p. 103–30 (2d ed. 2000). Cf. 1 J. Strong, McCormick on Evidence § 55, p. 246 (5th ed. 1999) ("If a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection"). Ohler seeks to avoid the consequences of this well-established commonsense principle by invoking Rules 103 and 609 of the Federal Rules of Evidence. But neither of these Rules addresses the question at issue here. Rule 103 sets forth the unremarkable propositions that a party must make a timely objection to a ruling admitting evidence and that a party cannot challenge an evidentiary ruling unless it affects a substantial right.[1] The Rule does not purport to determine when a party waives a prior objection, and it is silent with respect to the effect of introducing evidence on direct examination, and later assigning its admission as error on appeal.

Rule 609(a) is equally unavailing for Ohler; it merely identifies the situations in which a witness' prior conviction may be admitted for impeachment purposes.[2] The Rule originally provided that admissible prior conviction evidence could be elicited from the defendant or established by public record during cross-examination, but it was amended in 1990 to clarify that the evidence could also be introduced on direct examination. According to Ohler, it follows from this amendment that a party does not waive her objection to the *in limine* ruling by introducing the evidence herself. However, like Rule 103, Rule 609(a) simply does not address this issue. There is no question that the Rule authorizes the eliciting of a prior conviction on direct examination, but it does no more than that.

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[1] Federal Rule of Evidence 103(a): "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

"(1) . . . In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . ."

[2] Rule 609(a): "For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused . . . ."

Next, Ohler argues that it would be unfair to apply such a waiver rule in this situation because it compels a defendant to forgo the tactical advantage of pre-emptively introducing the conviction in order to appeal the *in limine* ruling. She argues that if a defendant is forced to wait for evidence of the conviction to be introduced on cross-examination, the jury will believe that the defendant is less credible because she was trying to conceal the conviction. The Government disputes that the defendant is unduly disadvantaged by waiting for the prosecution to introduce the conviction on cross-examination. First, the Government argues that it is debatable whether jurors actually perceive a defendant to be more credible if she introduces a conviction herself. Brief for United States 28. Second, even if jurors do consider the defendant more credible, the Government suggests that it is an unwarranted advantage because the jury does not realize that the defendant disclosed the conviction only after failing to persuade the court to exclude it. *Ibid.*

Whatever the merits of these contentions, they tend to obscure the fact that both the Government and the defendant in a criminal trial must make choices as the trial progresses. For example, the defendant must decide whether or not to take the stand in her own behalf. If she has an innocent or mitigating explanation for evidence that might otherwise incriminate, acquittal may be more likely if she takes the stand. Here, for example, Ohler testified that she had no knowledge of the marijuana discovered in the van, that the van had been taken to Mexico without her permission, and that she had gone there simply to retrieve the van. But once the defendant testifies, she is subject to cross-examination, including impeachment by prior convictions, and the decision to take the stand may prove damaging instead of helpful. A defendant has a further choice to make if she decides to testify, notwithstanding a prior conviction.

The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination.

The Government, too, in a case such as this, must make a choice. If the defendant testifies, it must choose whether or not to impeach her by use of her prior conviction. Here the trial judge had indicated he would allow its use,[3] but the Government still had to consider whether its use might be deemed reversible error on appeal. This choice is often based on the Government's appraisal of the apparent effect of the defendant's testimony. If she has offered a plausible, innocent explanation of the evidence against her, it will be inclined to use the prior conviction; if not, it may decide not to risk possible reversal on appeal from its use.

Due to the structure of trial, the Government has one inherent advantage in these competing trial strategies. Cross-examination comes after direct examination, and therefore the Government need not make its choice until the defendant has elected whether or not to take the stand in her own behalf and after the Government has heard the defendant testify.

Ohler's submission would deny to the Government its usual right to decide, after she testifies, whether or not to use her prior conviction against her. She seeks to short circuit that decisional process by offering the conviction herself (and thereby removing the sting) and still preserve its admission as a claim of error on appeal.

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[3] The District Court ruled on the first day of trial that Ohler's prior conviction would be admissible for impeachment purposes, and the court likely would have abided by that ruling at trial. However, *in limine* rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial. See *Luce* v. *United States*, 469 U. S. 38, 41–42 (1984). Ohler's position, therefore, would deprive the trial court of the opportunity to change its mind after hearing all of the defendant's testimony.

But here Ohler runs into the position taken by the Court in a similar, but not identical, situation in *Luce* v. *United States,* 469 U. S. 38 (1984), that "[a]ny possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative." *Id.,* at 41. Only when the Government exercises its option to elicit the testimony is an appellate court confronted with a case where, under the normal rules of trial, the defendant can claim the denial of a substantial right if in fact the district court's *in limine* ruling proved to be erroneous. In our view, there is nothing "unfair," as Ohler puts it, about putting her to her choice in accordance with the normal rules of trial.

Finally, Ohler argues that applying this rule to her situation unconstitutionally burdens her right to testify. She relies on *Rock* v. *Arkansas,* 483 U. S. 44 (1987), where we held that a prohibition of hypnotically refreshed testimony interfered with the defendant's right to testify. But here the rule in question does not prevent Ohler from taking the stand and presenting any admissible testimony which she chooses. She is of course subject to cross-examination and subject to impeachment by the use of a prior conviction. In a sense, the use of these tactics by the Government may deter a defendant from taking the stand. But, as we said in *McGautha* v. *California,* 402 U. S. 183, 215 (1971):

> "It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. . . . It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. . . . Again, it is not thought inconsistent with the enlightened administration of criminal justice to require

> the defendant to weigh such pros and cons in deciding whether to testify."

For these reasons, we conclude that a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error.

The judgment of the Court of Appeals for the Ninth Circuit is therefore affirmed.

*It is so ordered.*

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The majority holds that a testifying defendant perforce waives the right to appeal an adverse *in limine* ruling admitting prior convictions for impeachment. The holding is without support in precedent, the rules of evidence, or the reasonable objectives of trial, and I respectfully dissent.

The only case of this Court that the majority claims as even tangential support for its waiver rule is *Luce* v. *United States,* 469 U. S. 38 (1984). *Ante,* at 759. We held there that a criminal defendant who remained off the stand could not appeal an *in limine* ruling to admit prior convictions as impeachment evidence under Federal Rule of Evidence 609(a). Since the defendant had not testified, he had never suffered the impeachment, and the question was whether he should be allowed to appeal the *in limine* ruling anyway, on the rationale that the threatened impeachment had discouraged the exercise of his right to defend by his own testimony. The answer turned on the practical realities of appellate review.

An appellate court can neither determine why a defendant refused to testify, nor compare the actual trial with the one that would have occurred if the accused had taken the stand. With unavoidable uncertainty about whether and how much the *in limine* ruling harmed the defendant, and whether it affected the trial at all, a rule allowing a silent defendant to appeal would require courts either to attempt wholly speculative harmless-error analysis, or to grant new trials to some defendants who were not harmed by the ruling, and to some who never even intended to testify. In requiring testimony and actual impeachment before a defendant could appeal an *in limine* ruling to admit prior convictions, therefore, *Luce* did not derive a waiver rule from some general notion of fairness; it merely acknowledged the incapacity of an appellate court to assess the significance of the ruling for a defendant who remains silent.

This case is different, there being a factual record on which Ohler's claim can be reviewed. She testified, and there is no question that the *in limine* ruling controlled her counsel's decision to enquire about the earlier conviction; defense lawyers do not set out to impeach their own witnesses, much less their clients. Since analysis for harmless error is made no more difficult by the fact that the convictions came out on direct examination, not cross-examination, the case raises none of the practical difficulties on which *Luce* turned, and *Luce* does not dictate today's result.[1]

In fact, the majority's principal reliance is not on precedent but on the "commonsense" rule that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." *Ante,* at 755. But this is no more support for today's holding than *Luce* is, for the common sense that approves the rule also limits its reach to a point well short of this case. The general rule makes sense, first, when a party who has freely chosen to introduce evidence of a particular fact later sees his opponent's evidence of the same fact erroneously admitted. He suffers no prejudice. See *Mercer* v. *Theriot,* 377 U. S. 152, 154 (1964) *(per curiam);* 21 C. Wright & K. Graham, Federal Practice and Procedure § 5039, p. 203 (1977). The rule makes sense, second, when the objecting party takes inconsistent positions, first requesting admission and then assigning error to the admission of precisely the same evidence at his opponent's behest. "The party should not be permitted 'to blow hot and cold' in this way." 1 J. Strong, McCormick on Evidence § 55, p. 246, n. 14 (5th ed. 1999).

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[1] The *Luce* Court anticipated as much: "It is clear, of course, that had petitioner testified and been impeached by evidence of a prior conviction, the District Court's decision to admit the impeachment evidence would have been reviewable on appeal along with any other claims of error. The Court of Appeals would then have had a complete record detailing the nature of petitioner's testimony, the scope of the cross-examination, and the possible impact of the impeachment on the jury's verdict." 469 U. S., at 41. There are, of course, practical issues that may arise in these cases; for example, the trial court may feel unable to render a final and definitive *in limine* ruling. The majority does not focus on these potential difficulties, and neither do I, though some lower courts have addressed them. See, *e. g., Wilson* v. *Williams*, 182 F. 3d 562 (CA7 1999) (en banc). For the purposes of this case, we need consider only the circumstance in which a district court makes a ruling that is plainly final.

Neither of these reasons applies when (as here) the defendant has opposed admission of the evidence and introduced it herself only to mitigate its effect in the hands of her adversary. Such a case falls beyond the scope of the general principle, and the scholarship almost uniformly treats it as exceptional. See, *e. g.,* 1 J. Wigmore, Evidence § 18, p. 836 (P. Tillers rev. 1983) ("[A] party who has made an unsuccessful motion in limine to exclude evidence that he expects the proponent to offer may be able to first offer that same evidence without waiving his claim of error"); M. Graham, Handbook of Federal Evidence § 103.4, p. 17 (1981) ("However, the party may . . . himself bring out evidence ruled admissible over his objection to minimize its effect without it constituting a waiver of his objection"); 1 McCormick, *supra,* § 55, at 246 ("[W]hen [a party's] objection is made and overruled, he is entitled to treat this ruling as the 'law of the trial' and to explain or rebut, if he can, the evidence admitted over his protest"); D. Louisell & C. Mueller, Federal Evidence § 11, p. 65 (1977) ("Having done his best by objecting, the adversary would be indeed ill treated if then he was held to have thrown it all away by doing his best to protect his position by offering evidence of his own").[2] The general thrust of the law of evidence, then, not only fails to support the majority's approach, but points rather clearly in the other direction.

With neither precedent nor principle to support its chosen rule, the majority is reduced to saying that "there is nothing 'unfair' . . . about putting petitioner to her choice in accordance with the normal rules of trial."[3] *Ante*, at 759. Things are not this simple, however.

Any claim of a new rule's fairness under normal trial conditions will have to stand or fall on how well the rule would serve the objects that trials in general, and the Rules of Evidence in particular, are designed to achieve. Thus the provisions of Federal Rule of Evidence 102, that "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." A judge's job, accordingly, is to curb the tactics of the trial battle in favor of weighing evidence calmly and getting to the most sensible understanding of whatever gave rise to the controversy before the court. The question is not which side gains a tactical advantage, but which rule assists in uncovering the truth. Today's new rule can make no such claim.

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[2] The point on which the analysis of the cited treatises turns, it should be clear, is not which party first introduces the evidence, but rather which party seeks introduction and which exclusion. A defense lawyer who elicits testimony about prior convictions on direct examination, having failed in an attempt to have them excluded, is plainly making a defensive use of the convictions; he has no desire to impeach his client. The fact that it is the defense lawyer who first introduces the convictions, then, is irrelevant to the principle the majority invokes.

[3] For the reasons just given, this begs the question, which is whether the "normal rules of trial" apply beyond the normal circumstances for which they were devised.

Previously convicted witnesses may testify honestly, but some convictions raise more than the ordinary question about the witness's readiness to speak truthfully. A factfinder who appreciates a heightened possibility of perjury will respond with heightened scrutiny, and when a defendant discloses prior convictions at the outset of her testimony, the jury will bear those convictions in mind as she testifies, and will scrutinize what she says more carefully. The purpose of Rule 609, in making some convictions admissible to impeach a witness's credibility, is thus fully served by a defendant's own testimony that the convictions occurred.

It is true that when convictions are revealed only on cross-examination, the revelation also warns the factfinder, but the timing of their disclosure may do more. The jury may feel that in testifying without saying anything about the convictions the defendant has meant to conceal them. The jury's assessment of the defendant's testimony may be affected not only by knowing that she has committed crimes in the past, but by blaming her for not being forthcoming when she seemingly could have been. Creating such an impression of current deceit by concealment is very much at odds with any purpose behind Rule 609, being obviously antithetical to dispassionate factfinding in support of a sound conclusion. The chance to create that impression is a tactical advantage for the Government, but only in the majority's dismissive sense of the term; it may affect the outcome of the trial, but only if it disserves the search for truth.

Allowing the defendant to introduce the convictions on direct examination thus tends to promote fairness of trial without depriving the Government of anything to which it is entitled. There is no reason to discourage the defendant from introducing the conviction herself, as the majority's waiver rule necessarily does.

# VERMONT AGENCY OF NATURAL RESOURCES *v.* UNITED STATES EX REL. STEVENS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 98–1828. Argued November 29, 1999—Decided May 22, 2000

Under the False Claims Act (FCA), a private person (the relator) may bring a *qui tam* civil action "in the name of the [Federal] Government," 31 U. S. C. § 3730(b)(1), against "[a]ny person" who, *inter alia*, "knowingly presents . . . to . . . the . . . Government . . . a false or fraudulent claim for payment," § 3729(a). The relator receives a share of any proceeds from the action. §§ 3730(d)(1)–(2). Respondent Stevens brought such an action against petitioner state agency, alleging that it had submitted false claims to the Environmental Protection Agency in connection with federal grant programs the EPA administered. Petitioner moved to dismiss, arguing that a State (or state agency) is not a "person" subject to FCA liability and that a *qui tam* action in federal court against a State is barred by the Eleventh Amendment. The District Court denied the motion, and petitioner filed an interlocutory appeal. Respondent United States intervened in the appeal in support of respondent Stevens. The Second Circuit affirmed.

*Held:* A private individual may not bring suit in federal court on behalf of the United States against a State (or state agency) under the FCA. Pp. 771–788.

(a) A private individual has standing to bring suit in federal court on behalf of the United States under the FCA. Stevens meets the requirements necessary to establish Article III standing. In particular, he has demonstrated "injury in fact"—a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Arkansas*, 495 U. S. 149, 155. He contends he is suing to remedy injury in fact suffered by the United States—both the injury to its sovereignty arising from violation of its laws and the proprietary injury resulting from the alleged fraud. The concrete private interest that Stevens has in the outcome of his suit, in the form of the bounty he will receive if the suit is successful, is insufficient to confer standing, since that interest does not consist of obtaining compensation for, or preventing, the violation of a legally protected right. An adequate basis for Stevens' standing, however, is found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. Because the FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim, the United States' injury in fact suffices to confer standing on Stevens. This conclusion is confirmed by the long tradition of *qui tam* actions in England and the American Colonies, which conclusively demonstrates that such actions were "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 102. Pp. 771–778.

(b) The FCA does not subject a State (or state agency) to liability in a federal-court suit by a private individual on behalf of the United States. Such a State or agency is not a "person" subject to *qui tam* liability under § 3729(a). The Court's longstanding interpretive presumption that "person" does not include the sovereign applies to the text of § 3729(a). Although not a hard and fast rule of exclusion, the presumption may be disregarded only upon some affirmative showing of statutory intent to the contrary. As the historical context makes clear, various features of the FCA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term "person" included States for purposes of *qui tam* liability, indicate quite the contrary. This conclusion is buttressed by the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the statute's language, and by the doctrine that statutes should be construed so as to avoid difficult constitutional questions. The Court expresses no view as to whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but notes that there is "a serious doubt" on that score. *Ashwander* v. *TVA*, 297 U. S. 288, 348. Pp. 778–787.

162 F. 3d 195, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, THOMAS, and BREYER, JJ., joined. BREYER, J., filed a concurring statement, *post*, p. 788. GINSBURG, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 788. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 789.

*J. Wallace Malley, Jr.*, Deputy Attorney General of Vermont, argued the cause for petitioner. With him on the briefs were *William H. Sorrell*, Attorney General, *Bridget C. Asay*, *Mark J. Di Stefano*, and *Wendy Morgan*, Assistant

Attorneys General, *David M. Rocchio,* Special Assistant Attorney General, *Ronald A. Shems,* and *Carter G. Phillips.*

*Deputy Solicitor General Kneedler* argued the cause for respondent United States. With him on the briefs were *Solicitor General Waxman, Acting Assistant Attorney General Ogden, Deputy Solicitor General Underwood, Malcolm L. Stewart, Michael F. Hertz, Douglas N. Letter,* and *Michael E. Robinson.*

*Theodore B. Olson* argued the cause for respondent Stevens. With him on the briefs were *Thomas G. Hungar, Miguel A. Estrada, Stephen J. Soule, Matthew E. C. Pifer,* and *Mark G. Hall.**

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Preeta D. Bansal,* Solicitor General, *Peter H. Schiff,* Deputy Solicitor General, and *Howard L. Zwickel,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *Mark Pryor* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Thurbert E. Baker* of Georgia, *Earl I. Anzai* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *John J. Farmer, Jr.,* of New Jersey, *Patricia A. Madrid* of New Mexico, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *John Cornyn* of Texas, *Jan Graham* of Utah, *Mark L. Earley* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.,* of West Virginia, and *Gay Woodhouse* of Wyoming; for the City of New York et al. by *Leonard J. Koerner, James K. Hahn, Richard A. Devine, Patrick T. Driscoll, Jr., Thomas Burnham, Donna M. Lach, Louise H. Renne,* and *Patrick J. Mahoney;* for the Alabama Medicaid Agency et al. by *Charles A. Miller* and *Caroline M. Brown;* for the American Medical Association et al. by *Jack*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U. S. C. §§ 3729–3733.

## I

Originally enacted in 1863, the False Claims Act (FCA) is the most frequently used of a handful of extant laws creating a form of civil action known as *qui tam*.[1] As amended, the

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*R. Bierig, Paul E. Kalb, Michael L. Ile, Anne M. Murphy,* and *Leonard A. Nelson;* for the American Petroleum Institute by *Donald B. Craven, Clarence T. Kipps, Jr., Alan I. Horowitz,* and *Peter B. Hutt II;* for FMC Corporation by *Donald B. Ayer, Gregory G. Katsas,* and *John B. Kennedy;* for the National Governors' Association et al. by *Richard Ruda* and *James I. Crowley;* for the Orleans Parish School Board et al. by *Sam A. LeBlanc III* and *Robert Markle;* for the Regents of the University of Minnesota et al. by *Mark B. Rotenberg* and *Mark A. Bohnhorst.*

Briefs of *amici curiae* urging affirmance were filed for the National WhistleBlower Center by *Stephen M. Kohn, Michael D. Kohn,* and *David K. Colapinto;* and for Taxpayers Against Fraud by *Evan H. Caminker* and *Jonathan S. Massey.*

Briefs of *amici curiae* were filed for the Aerospace Industries Association of America, Inc., by *Charles G. Cole, Jerald S. Howe, Jr.,* and *Shannen W. Coffin;* for the American Clinical Laboratory Association by *Hope S. Foster;* for the Chamber of Commerce of the United States of America et al. by *Herbert L. Fenster, Stephen A. Bokat,* and *Robin S. Conrad;* for the Federation of American Health Systems by *Walter E. Dellinger* and *Charles R. Work;* for Friends of the Earth et al. by *James S. Chandler, Jr., Bruce J. Terris,* and *Carolyn Smith Pravlik;* for the National Employment Lawyers Association by *Frederick M. Morgan, Jr., James B. Helmer, Jr.,* and *Paula A. Brantner;* for the Project on Government Oversight by *Charles Tiefer* and *Jonathan W. Cuneo;* and for Taxpayers Against Fraud by *Evan H. Caminker* and *Vicki C. Jackson.*

[1] *Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which means "who pursues this action on our Lord the King's behalf as well as his own." The phrase dates from at least the time of Blackstone. See 3 W. Blackstone, Commentaries *160.

Three other *qui tam* statutes, all also enacted over 100 years ago, remain on the books. See 25 U. S. C. § 81 (providing cause of action and

FCA imposes civil liability upon "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U. S. C. § 3729(a). The defendant is liable for up to treble damages and a civil penalty of up to $10,000 per claim. *Ibid.* An FCA action may be commenced in one of two ways. First, the Government itself may bring a civil action against the alleged false claimant. § 3730(a). Second, as is relevant here, a private person (the relator) may bring a *qui tam* civil action "for the person and for the United States Government" against the alleged false claimant, "in the name of the Government." § 3730(b)(1).

If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, § 3730(b)(2), which then has 60 days to intervene in the action, §§ 3730(b)(2), (4). If it does so, it assumes primary responsibility for prosecuting the action, § 3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement, § 3730(c)(2). If the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, § 3730(b)(4), and the Government may subsequently intervene only on a showing of "good cause," § 3730(c)(3). The relator receives a share of any proceeds from the action—generally ranging from 15

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share of recovery against a person contracting with Indians in an unlawful manner); § 201 (providing cause of action and share of recovery against a person violating Indian protection laws); 35 U. S. C. § 292(b) (providing cause of action and share of recovery against a person falsely marking patented articles); cf. 18 U. S. C. § 962 (providing for forfeiture to informer of share of vessels privately armed against friendly nations, but not expressly authorizing suit by informer); 46 U. S. C. § 723 (providing for forfeiture to informer of share of vessels removing undersea treasure from the Florida coast to foreign nations, but not expressly authorizing suit by informer).

to 25 percent if the Government intervenes (depending upon the relator's contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court's assessment of what is reasonable)—plus attorney's fees and costs. §§ 3730(d)(1)–(2).

Respondent Jonathan Stevens brought this *qui tam* action in the United States District Court for the District of Vermont against petitioner Vermont Agency of Natural Resources, his former employer, alleging that it had submitted false claims to the Environmental Protection Agency (EPA) in connection with various federal grant programs administered by the EPA. Specifically, he claimed that petitioner had overstated the amount of time spent by its employees on the federally funded projects, thereby inducing the Government to disburse more grant money than petitioner was entitled to receive. The United States declined to intervene in the action. Petitioner then moved to dismiss, arguing that a State (or state agency) is not a "person" subject to liability under the FCA and that a *qui tam* action in federal court against a State is barred by the Eleventh Amendment. The District Court denied the motion in an unpublished order. App. to Pet. for Cert. 86–87. Petitioner then filed an interlocutory appeal,[2] and the District Court stayed proceedings pending its outcome. Respondent United States intervened in the appeal in support of respondent Stevens. A divided panel of the Second Circuit affirmed, 162 F. 3d 195 (1998), and we granted certiorari, 527 U. S. 1034 (1999).

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[2] The denial of a motion to dismiss based on a claim of Eleventh Amendment immunity is immediately appealable. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139 (1993). The Second Circuit exercised pendent appellate jurisdiction over the statutory question. See *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 50–51 (1995).

## II

We first address the jurisdictional question whether respondent Stevens has standing under Article III of the Constitution to maintain this suit. See *Steel Co.* v. *Citizens for Better Environment,* 523 U. S. 83, 93–102 (1998).

As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing. See, *e. g., Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.,* 528 U. S. 167, 180–181 (2000). First, he must demonstrate "injury in fact"—a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Arkansas,* 495 U. S. 149, 155 (1990) (internal quotation marks and citation omitted). Second, he must establish causation—a "fairly . . . trace[able]" connection between the alleged injury in fact and the alleged conduct of the defendant. *Simon* v. *Eastern Ky. Welfare Rights Organization,* 426 U. S. 26, 41 (1976). And third, he must demonstrate redressability—a "substantial likelihood" that the requested relief will remedy the alleged injury in fact. *Id.,* at 45. These requirements together constitute the "irreducible constitutional minimum" of standing, *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 560 (1992), which is an "essential and unchanging part" of Article III's case-or-controversy requirement, *ibid.,* and a key factor in dividing the power of government between the courts and the two political branches, see *id.,* at 559–560.

Respondent Stevens contends that he is suing to remedy an injury in fact suffered by the United States. It is beyond doubt that the complaint asserts an injury to the United States—both the injury to its sovereignty arising from violation of its laws (which suffices to support a criminal lawsuit by the Government) and the proprietary injury resulting from the alleged fraud. But "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party.*" *Warth* v. *Seldin,* 422 U. S. 490, 499 (1975) (emphasis added); see also *Sierra Club* v. *Morton,* 405 U. S. 727, 734–735 (1972). It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, *in whose name* (as the statute provides, see 31 U. S. C. § 3730(b)) the suit is brought—and that the relator's bounty is simply the fee he receives *out of the United States' recovery* for filing and/or prosecuting a successful action on behalf of the Government. This analysis is precluded, however, by the fact that the statute gives the relator himself an interest *in the lawsuit,* and not merely the right to retain a fee out of the recovery. Thus, it provides that "[a] person may bring a civil action for a violation of section 3729 *for the person and for the United States Government,*" § 3730(b) (emphasis added); gives the relator "the right to continue as a party to the action" even when the Government itself has assumed "primary responsibility" for prosecuting it, § 3730(c)(1); entitles the relator to a hearing before the Government's voluntary dismissal of the suit, § 3730(c)(2)(A); and prohibits the Government from settling the suit over the relator's objection without a judicial determination of "fair[ness], adequa[cy] and reasonable[ness]," § 3730(c)(2)(B). For the portion of the recovery retained by the relator, therefore, some explanation of standing other than agency for the Government must be identified.

There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a "concrete private interest in the outcome of [the] suit." *Lujan, supra,* at 573. But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U. S. 464, 486 (1982); *Sierra Club, supra,* at 734–735. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. See *Lujan, supra,* at 560–561. A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails.[3] This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. See *Warth, supra,* at 500. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes. See *Steel Co., supra,* at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit"); see also *Diamond* v. *Charles,* 476 U. S. 54, 69–71 (1986) (holding that assessment of attorney's fees against a party does not confer standing to pursue the action on appeal).

We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.[4] Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits, see, *e. g.,*

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[3] Blackstone noted, with regard to English *qui tam* actions, that "no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after action brought," and that the bounty constituted an "inchoate imperfect degree of property . . . [which] is not consummated till judgment." 2 W. Blackstone, Commentaries *437.

[4] In addressing the Eleventh Amendment issue that we leave open today, the dissent suggests that we are asserting that a *qui tam* relator "is, in effect, suing as an assignee of the United States." *Post,* at 802 (opinion of STEVENS, J.); see also *post,* at 796 (same). More precisely, we are asserting that a *qui tam* relator is, in effect, suing as a *partial* assignee of the United States.

*Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 465 (1962); *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 829 (1950); *Hubbard* v. *Tod*, 171 U. S. 474, 475 (1898)—and also suits by subrogees, who have been described as "equitable assign[ees]," L. Simpson, Law of Suretyship 205 (1950); see, *e. g.*, *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 531 (1995); *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 288 (1993). We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

We are confirmed in this conclusion by the long tradition of *qui tam* actions in England and the American Colonies. That history is particularly relevant to the constitutional standing inquiry since, as we have said elsewhere, Article III's restriction of the judicial power to "Cases" and "Controversies" is properly understood to mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U. S., at 102; see also *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939) (opinion of Frankfurter, J.) (the Constitution established that "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies'").

*Qui tam* actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf. See, *e. g.*, *Prior of Lewes* v. *De Holt* (1300), reprinted in 48 Selden Society 198 (1931). Suit in this dual capacity was a device for getting their private claims into the respected royal courts, which generally entertained only matters involving the Crown's interests. See Milsom, Trespass from Henry III to Edward III, Part III: More Special Writs and Conclusions, 74 L. Q. Rev. 561, 585 (1958). Starting in the 14th century, as the royal courts began to extend jurisdiction to suits involving wholly private wrongs, the common-law *qui tam* action gradually fell into disuse, although it seems to have remained technically available for several centuries. See 2 W. Hawkins, Pleas of the Crown 369 (8th ed. 1824).

At about the same time, however, Parliament began enacting statutes that explicitly provided for *qui tam* suits. These were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's), see, *e. g.*, Statute Providing a Remedy for Him Who Is Wrongfully Pursued in the Court of Admiralty, 2 Hen. IV, ch. 11 (1400), and—more relevant here—those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves, see, *e. g.*, Statute Prohibiting the Sale of Wares After the Close of Fair, 5 Edw. III, ch. 5 (1331); see generally Common Informers Act, 14 & 15 Geo. VI, ch. 39, sched. (1951) (listing informer statutes). Most, though not all, of the informer statutes expressly gave the informer a cause of action, typically by bill, plaint, information, or action of debt. See, *e. g.*, Bill for Leases of Hospitals, Colleges, and Other Corporations, 33 Hen. VIII, ch. 27 (1541); Act to Avoid Horse-Stealing, 31 Eliz. I, ch. 12, §2 (1589); Act to Prevent the Over-Charge of the People by Stewards of Court-Leets and Court-Barons, 2 Jac. I, ch. 5 (1604).

For obvious reasons, the informer statutes were highly subject to abuse, see M. Davies, The Enforcement of English Apprenticeship 58–61 (1956)—particularly those relating to obsolete offenses, see generally 3 E. Coke, Institutes of the Laws of England 191 (4th ed. 1797) (informer prosecutions under obsolete statutes had been used to "vex and entangle the subject"). Thus, many of the old enactments were repealed, see Act for Continuing and Reviving of Divers Statutes and Repeal of Divers Others, 21 Jac. I, ch. 28, §11

(1623), and statutes were passed deterring and penalizing vexatious informers, limiting the locations in which informer suits could be brought, and subjecting such suits to relatively short statutes of limitation, see Act to Redress Disorders in Common Informers, 18 Eliz. I, ch. 5 (1576); Act Concerning Informers, 31 Eliz. I, ch. 5 (1589); see generally Davies, *supra,* at 63–76. Nevertheless, laws allowing *qui tam* suits by informers continued to exist in England until 1951, when all of the remaining ones were repealed. See Note, The History and Development of Qui Tam, 1972 Wash. U. L. Q. 81, 88, and n. 44 (citing Common Informers Act, 14 & 15 Geo. VI, ch. 39 (1951)).

*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution. Although there is no evidence that the Colonies allowed common-law *qui tam* actions (which, as we have noted, were dying out in England by that time), they did pass several informer statutes expressly authorizing *qui tam* suits. See, *e. g.,* Act for the Restraining and Punishing of Privateers and Pirates, 1st Assembly, 4th Sess. (N. Y. 1692), reprinted in 1 Colonial Laws of New York 279, 281 (1894) (allowing informers to sue for, and receive share of, fine imposed upon officers who neglect their duty to pursue privateers and pirates). Moreover, immediately after the framing, the First Congress enacted a considerable number of informer statutes.[5] Like their English counterparts, some of them provided both a bounty and an express cause of action;[6] others provided a bounty only.[7]

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[5] In addition, the First Congress passed one statute allowing injured parties to sue for damages on both their own and the United States' behalf. See Act of May 31, 1790, ch. 15, §2, 1 Stat. 124–125 (allowing author or proprietor to sue for and receive half of penalty for violation of copyright); cf. Act of Mar. 1, 1790, ch. 2, §6, 1 Stat. 103 (allowing census taker to sue for and receive half of penalty for failure to cooperate in census); Act of July 5, 1790, ch. 25, §1, 1 Stat. 129 (extending same to Rhode Island).

We think this history well nigh conclusive with respect to the question before us here: whether *qui tam* actions were "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523

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[6] See Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102 (allowing informer to sue for, and receive half of fine for, failure to file census return); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (extending same to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (allowing private individual to sue for, and receive half of fine for, carriage of seamen without contract or illegal harboring of runaway seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–138 (allowing private individual to sue for, and receive half of goods forfeited for, unlicensed trading with Indian tribes); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 209 (allowing person who discovers violation of spirits duties, or officer who seizes contraband spirits, to sue for and receive half of penalty and forfeiture, along with costs, in action of debt); cf. Act of Apr. 30, 1790, ch. 9, §§ 16, 17, 1 Stat. 116 (allowing informer to conduct prosecution, and receive half of fine, for criminal larceny or receipt of stolen goods).

[7] See Act of July 31, 1789, ch. 5, § 29, 1 Stat. 44–45 (giving informer full penalty paid by customs official for failing to post fee schedule); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 173 (same); Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48 (giving informer quarter of penalties, fines, and forfeitures authorized under a customs law); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 60 (same under a maritime law); Act of Aug. 4, 1790, ch. 35, § 69, 1 Stat. 177 (same under another customs law); Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (providing informer half of penalty upon conviction for violation of conflict-of-interest and bribery provisions in Act establishing Treasury Department); Act of Mar. 3, 1791, ch. 8, § 1, 1 Stat. 215 (extending same to additional Treasury employees); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 195–196 (providing informer half or fifth of fines resulting from improper trading or lending by agents of Bank of United States); cf. Act of Aug. 4, 1790, ch. 35, § 4, 1 Stat. 153 (apportioning half of penalty for failing to deposit ship manifest to official who should have received manifest, and half to collector in port of destination).

We have suggested, in dictum, that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 541, n. 4 (1943).

U. S., at 102. When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.[8] We turn, then, to the merits.

## III

Petitioner makes two contentions: (1) that a State (or state agency) is not a "person" subject to *qui tam* liability under the FCA; and (2) that if it is, the Eleventh Amendment bars such a suit. The Courts of Appeals have disagreed as to the order in which these statutory and Eleventh Amendment immunity questions should be addressed. Compare *United States ex rel. Long* v. *SCS Business & Technical Institute, Inc.*, 173 F. 3d 890, 893–898 (CADC 1999) (statutory question first), with *United States ex rel. Foulds* v. *Texas Tech Univ.*, 171 F. 3d 279, 285–288 (CA5 1999) (Eleventh Amendment immunity question first).

Questions of jurisdiction, of course, should be given priority—since if there is no jurisdiction there is no authority to sit in judgment of anything else. See *Steel Co., supra*, at 93–102. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869). Even jurisdiction over the person (as opposed to subject-matter jurisdiction) "is 'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 584 (1999) (quoting *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 382 (1937)).

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[8] In so concluding, we express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the "take Care" Clause of § 3. Petitioner does not challenge the *qui tam* mechanism under either of those provisions, nor is the validity of *qui tam* suits under those provisions a jurisdictional issue that we must resolve here. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 102, n. 4 (1998) ("[O]ur standing jurisprudence, . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II"); see also *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 576–578 (1992).

The dissent implicitly attacks us for "introduc[ing] [this question] *sua sponte*." *Post*, at 801. We raise the question, however, only to make clear that it is not at issue in this case. It is only the dissent that proceeds to volunteer an answer. See *post*, at 801–802.

We nonetheless have routinely addressed *before* the question whether the Eleventh Amendment forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself *permits* the cause of action it creates to be asserted against States (which it can do only by clearly expressing such an intent). See, *e. g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 73–78 (2000); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 55–57 (1996); cf. *Hafer* v. *Melo*, 502 U. S. 21, 25–31 (1991); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 277–281 (1977). When these two questions are at issue, not only is the statutory question "logically antecedent to the existence of" the Eleventh Amendment question, *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 612 (1997), but also there is no realistic possibility that addressing the statutory question will expand the Court's power beyond the limits that the jurisdictional restriction has imposed. The question whether the statute provides for suits against the States (as opposed, for example, to the broader question whether the statute creates any private cause of action whatever, or the question whether the facts alleged make out a "false claim" under the statute) does not, as a practical matter, permit the court to pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway. The ultimate issue in the statutory inquiry is whether States can be sued under this statute; and the ultimate issue in the Eleventh Amendment inquiry is whether unconsenting States can be sued under this statute. This combination of logical priority and virtual coincidence of scope makes it possible, and indeed appropriate, to decide the statutory issue first. We therefore begin (and will end) with the statutory question.

The relevant provision of the FCA, 31 U. S. C. § 3729(a), subjects to liability "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." We must apply to this text our longstanding interpretive presumption that "person" does not include the sovereign. See *United States* v. *Cooper Corp.*, 312 U. S. 600, 604 (1941); *United States* v. *Mine Workers*, 330 U. S. 258, 275 (1947).[9] The

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[9] The dissent claims that, "[a]lthough general statutory references to 'persons' are not normally construed to apply to the enacting sovereign, when Congress uses that word in federal statutes enforceable by the Federal Government or by a federal agency, it applies to States and state agencies as well as to private individuals and corporations." *Post*, at 790 (citation omitted). The dissent cites three cases in support of this assertion. None of them, however, involved a statutory provision authorizing private suit against a State. *California* v. *United States*, 320 U. S. 577 (1944), disregarded the presumption in a case brought against a State by the Federal Government (and under a statutory provision authorizing suit *only* by the Federal Government). See *id.*, at 585–586. *United States* v. *California*, 297 U. S. 175 (1936), found the presumption overcome in similar circumstances—and with regard to a statute that used not the word "person," but rather the phrase "common carrier." See *id.*, at 186–187. And *Georgia* v. *Evans*, 316 U. S. 159 (1942), held that the presumption was overcome when, if a State were not regarded as a "person" for purposes of *bringing* an action under § 7 of the Sherman Act, it would be left "without any redress for injuries resulting from practices outlawed by that Act." *Id.*, at 162.

The dissent contends that "[t]he reason for presuming that an enacting sovereign does not intend to authorize litigation against itself simply does not apply to federal statutes that apply equally to state agencies and private entities." *Post*, at 798. That is true enough, but in the American system there is a different reason, equally valid. While the States do not have the immunity against federally authorized suit that international law has traditionally accorded foreign sovereigns, see *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 358–359 (1955), they are sovereigns nonetheless, and both comity and respect for our federal system presumption is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 64 (1989); *Wilson* v. *Omaha Tribe*, 442 U. S. 653, 667 (1979). The presumption is, of course, not a "hard and fast rule of exclusion," *Cooper Corp., supra*, at 604–605, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary. See *International Primate Protection League* v. *Administrators of Tulane Ed. Fund*, 500 U. S. 72, 83 (1991).

As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of "stopping the massive frauds perpetrated by large [private] contractors during the Civil War." *United States* v. *Bornstein*, 423 U. S. 303, 309 (1976); see also *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 547 (1943).[10] Its

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demand that something more than mere use of the word "person" demonstrate the federal intent to authorize unconsented private suit against them. In any event, JUSTICE STEVENS fought and lost this battle in *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989), in which the Court applied the presumption to a federal statute when the "person" at issue was a State. See *id.*, at 64; but see *id.*, at 73 (Brennan, J., dissenting, joined by Marshall, Blackmun, and STEVENS, JJ.). Moreover, JUSTICE STEVENS actually joined the Court's opinion in *Wilson* v. *Omaha Tribe*, 442 U. S. 653 (1979), in which the Court likewise applied the presumption to a federal statute in a case involving a State. See *id.*, at 667. (*Wilson* is omitted from the dissent's discussion of "[c]ases decided before 1986," which it claims "uniformly support" its reading of the statute. *Post*, at 790.)

[10] The dissent contends that the FCA was "intended to cover the full range of fraudulent acts, including those perpetrated by States." *Post*, at 793, and n. 4 (quoting *United States* v. *Neifert-White Co.*, 390 U. S. 228, 232 (1968); *Rainwater* v. *United States*, 356 U. S. 590, 592 (1958); H. R. Rep. No. 99–660, p. 18 (1985)). The sources the dissent quotes, however, support its contention only as far as the comma. They stand for the unobjectionable proposition (codified in § 3729(c)) that the FCA was intended to cover all types of *fraud*, not for the additional proposition that the FCA was intended to cover all types of *fraudsters*, including States.

liability provision—the precursor to today's § 3729(a)—bore no indication that States were subject to its penalties. Indeed, far from indicating that *States* were covered, it did not even make clear that *private corporations* were, since it applied only to "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," and imposed criminal penalties that included imprisonment.[11] Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698. We do not suggest that these features directed only at natural persons cast doubt upon the courts' assumption that § 3729(a) extends to corporations, see, *e. g., United States ex rel. Woodard* v. *Country View Care Center, Inc.*, 797 F. 2d 888, 890 (CA10 1986)—but that is because the presumption with regard to corporations is just the opposite of the one governing here: they are presumptively *covered* by the term "person," see 1 U. S. C. § 1. But the text of the original statute does less than nothing to overcome the presumption that States are *not* covered.

Although the liability provision of the original FCA has undergone various changes, none of them suggests a broadening of the term "person" to include States. In 1982, Congress made a housekeeping change, replacing the phrase "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States" with the phrase "[a] person not a member of an armed force of the United States," thereby incorporating the term of art "member of an armed force" used throughout Title 10 of the United States Code. 31 U. S. C. § 3729 (1982 ed.). And in 1986, Congress eliminated the blanket exemption for members of the Armed Forces, replacing the phrase "[a] person not a member of an armed force of the United States" with the current "[a]ny person." 31 U. S. C. § 3729(a).[12]

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[11] The criminal provision remains on the books and is currently codified separately, as amended, at 18 U. S. C. § 287.

Several features of the current statutory scheme further support the conclusion that States are not subject to *qui tam* liability. First, another section of the FCA, 31 U. S. C. § 3733, which enables the Attorney General to issue civil investigative demands to "any person . . . possessi[ng] information relevant to a false claims law investigation," § 3733(a)(1), contains a provision expressly defining "person," "[f]or purposes of this section," to include States, § 3733(*l*)(4).[13] The presence of such a definitional provision in § 3733, together with the absence of such a provision from the definitional provisions contained in § 3729, see §§ 3729(b)–(c), suggests that States are not "persons" for purposes of *qui tam* liability under § 3729.[14]

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[12] The dissent claims that "[t]he term 'person' in § 3729(a) that we are interpreting today was enacted by the 1986 Congress, not by the 1863 Congress." *Post*, at 794, n. 5. But the term "person" has remained in the statute unchanged since 1863; the 1986 amendment merely changed the modifier "[a]" to "[a]ny." This no more caused the word "person" to include States than did the replacement of the word "any" with "[a]" four years earlier. The dissent's sole basis for giving the change from "[a]" to "[a]ny" this precise and unusual consequence is a single sentence of legislative history from the 1986 Congress. That would be unequal to the task in any event, but as it happens the sentence was not even describing the consequence of the proposed revision, but was setting forth a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier. The paragraph in which the sentence appears discusses the FCA "[i]n its present," *i. e.*, pre-1986, "form." S. Rep. No. 99–345, p. 8 (1986).

The dissent contradicts its contention that the "intent" of the 1986 Congress, rather than that of the 1863 Congress, controls here, by relying heavily on a House Committee Report from 1862. *Post*, at 791–792 (citing H. R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii–a, pp. XXXVIII–XXXIX (1862)). Even for those disposed to allow the meaning of a statute to be determined by a single committee, that Report is utterly irrelevant, since it was not prepared in connection with the 1863 Act, or indeed in connection with any proposed false claims legislation. In repeating the Second Circuit's unsupported assertion that Congress must have had this Report in mind a year later when it enacted the FCA, the dissent asks us to indulge even a greater suspension of disbelief than legislative history normally requires. And finally, this irrelevant committee Report does not provide the promised support for the view that "[t]he False Claims Act is . . . as capable of being violated by state as by individual action," *post*, at 791. The cited portion details a single incident of fraud by a state *official* against a *State*, not an incident of fraud by a State against the Federal Government.

Second, the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities. See, *e. g., Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 262–263 (1981).[15] Although this Court suggested that damages under an earlier version of the FCA were remedial rather than punitive, see *Bornstein*, 423 U. S., at 315; but see *Smith* v. *Wade*, 461 U. S. 30, 85 (1983) (REHNQUIST, J., dissenting), that version of the statute imposed only double damages and a civil penalty of $2,000 per claim, see 31 U. S. C. § 231 (1976 ed.); the current version, by contrast, generally imposes treble damages and a civil penalty of up to $10,000 per claim, see 31 U. S. C. § 3729(a).[16] Cf. *Marcus*, 317 U. S., at 550 (noting that double damages in original FCA were not punitive, but suggesting that treble damages, such as those in the antitrust laws, would have been). "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639 (1981).

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[13] The dissent points out that the definition of "person" in § 3733(*l*)(4) also applies to § 3733(*l*)(2), a definitional provision which defines the phrase "false claims law investigation" as "any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law." See *post*, at 789, 795. But the effect of assuming a State to be a "person" for purposes of that definitional section is *not* to embrace investigations of States within the definition. A "false claims investigation" will *still* not include an investigation of a State, since whether a "person" (*however* broadly defined) "is or has been engaged in any violation of a false claims law" depends on whether that person is *subject to* the "false claims law," which refers us back to § 3729, to which § 3733(*l*)(4)'s definition of "person" is explicitly made inapplicable. What the application of § 3733(*l*)(4) to § 3733(*l*)(2) *does* achieve is to subject States, *not* to *qui tam* liability, but to civil investigative demands. That is entirely appropriate, since States will often be able to provide useful evidence in investigations of private contractors.

[14] The dissent contends that our argument "prove[s] too much," since the definition of "person" in § 3733(*l*)(4) includes not just States, but also "any natural person, partnership, corporation, association, or other legal entity"; under our reasoning, it contends, all of those entities would *also* be excluded from the definition of "person" under § 3729. *Post*, at 799. That is not so. Unlike States, all of those entities are presumptively *covered* by the term "person." See 1 U. S. C. § 1. The *addition* of States to 31 U. S. C. § 3733, and the failure to add States to § 3729, suggests that States are not subject to *qui tam* liability under § 3729.

The dissent attempts to explain the absence of a definitional provision in § 3729 by suggesting that Congress "simply saw no need to add a definition of 'person' in § 3729 because . . . the meaning of the term 'person' was already well understood." *Post*, at 799. If that were so, and if the "understanding" included States, there would have been no need to include a definition of "person" in *§ 3733*.

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[15] The dissent attempts to distinguish *Newport* on the basis of a single sentence in that opinion stating that "courts vie[w] punitive damages [against governmental bodies] as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Newport* v. *Fact Concerts, Inc.*, 453 U. S., at 263. The dissent contends that *Newport* is inapplicable where, as here, "[t]he taxpaying 'citizens for whose benefit' the [statute] is designed are the citizens of the United States, not the citizens of any individual State that might violate the [statute]." *Post*, at 801. The problem with this is that Rev. Stat. § 1979, 42 U. S. C. § 1983—the statute at issue in *Newport*—is, like the FCA, a federal law designed to benefit "the citizens of the United States, not the citizens of any individual State that might violate the [statute]." A better reading of *Newport* is that we were concerned with imposing punitive damages on taxpayers under any circumstances. " '[Punitive damages], being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification.' " *Newport, supra*, at 261 (quoting *McGary* v. *President & Council of City of Lafayette*, 12 Rob. 668, 677 (La. 1846)).

[16] As the dissent correctly points out, see *post*, at 801, n. 11, treble damages may be reduced to double damages in certain cases, see § 3729(a). This exception, however, applies only in some of those (presumably few) cases involving defendants who provide information concerning the violation before they have knowledge that an investigation is underway. See *ibid.*

Third, the Program Fraud Civil Remedies Act of 1986 (PFCRA), a sister scheme creating administrative remedies for false claims—and enacted just before the FCA was amended in 1986—contains (unlike the FCA) a definition of "persons" subject to liability, and that definition does not include States. See 31 U. S. C. § 3801(a)(6) (defining "person" as "any individual, partnership, corporation, association, or private organization"). It would be most peculiar to subject States to treble damages and civil penalties in *qui tam* actions under the FCA, but exempt them from the relatively smaller damages provided under the PFCRA. See § 3802(a)(1).[17]

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[17] The dissent attempts to distinguish the PFCRA on the ground that it is a separate and subsequently enacted statute. See *post,* at 799–800, and n. 10. But it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted. See *FDA* v. *Brown & Williamson Tobacco Corp., ante,* at 133; *United States* v. *Fausto,* 484 U. S. 439, 453 (1988). Moreover, there is no question that the PFCRA was designed to operate in tandem with the FCA. Not only was it enacted at virtually the same time as the FCA was amended in 1986, but its scope is virtually identical to that of the FCA. Compare § 3729(a) (FCA) ("Any person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval . . .") with § 3802(a)(1) (PFCRA) ("Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know . . . is false, fictitious, or fraudulent . . ."). The dissent would, in any event, subject States to suit under the PFCRA no less than under the FCA—despite its detailed definition of "person" that does not include States. In justification of this the dissent again cites *California* v. *United States,* 320 U. S.,

In sum, we believe that various features of the FCA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term "person" included States for purposes of *qui tam* liability, indicate quite the contrary. Our conclusion is buttressed by two other considerations that we think it unnecessary to discuss at any length: first, "the ordinary rule of statutory construction" that "if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," *Will*, 491 U. S., at 65 (internal quotation marks and citation omitted); see also *Gregory* v. *Ashcroft*, 501 U. S. 452, 460–461 (1991); *United States* v. *Bass*, 404 U. S. 336, 349 (1971), and second, the doctrine that statutes should be construed so as to avoid difficult constitutional questions. We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is "a serious doubt" on that score. *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring) (internal quotation marks and citation omitted).[18]

* * *

We hold that a private individual has standing to bring suit in federal court on behalf of the United States under the False Claims Act, 31 U. S. C. §§3729–3733, but that the

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at 585, and *Evans*, 316 U. S., at 160. In addition to being inapposite because they did not authorize suits against States by private parties, see n. 9, *supra*, the definitions of "person" in the statutes at issue in those cases were not as detailed as that of the PFCRA, and set forth what the term "person" *included*, rather than, as the PFCRA does, what the term "person" "*means*," see 31 U. S. C. §3801(a)(6) (emphasis added).

[18] Although the dissent concludes that States can be "persons" for purposes of *commencing* an FCA *qui tam* action under §3730(b), see *post*, at 794–795, we need not resolve that question here, and therefore leave it open.

False Claims Act does not subject a State (or state agency) to liability in such actions. The judgment of the Second Circuit is reversed.

*It is so ordered.*

JUSTICE BREYER, concurring.

I join the opinion of the Court in full. I also join the opinion of JUSTICE GINSBURG.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in the judgment.

I join the Court's judgment and here state the extent to which I subscribe to the Court's opinion.

I agree with the Court that the *qui tam* relator is properly regarded as an assignee of a portion of the Government's claim for damages. See *ante,* at 773. And I agree, most vitally, that "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Ante,* at 774. On that key matter, I again agree that history's pages place the *qui tam* suit safely within the "case" or "controversy" category. See *ante,* at 774–778.

In *Steel Co.* v. *Citizens for Better Environment,* 523 U. S. 83 (1998), I reasoned that if Congress did not authorize a citizen suit, a court should dismiss the citizen suitor's complaint without opining "on the constitutionality of what Congress might have done, but did not do." *Id.,* at 134 (opinion concurring in judgment). I therefore agree that the Court properly turns first to the statutory question here presented: Did Congress authorize *qui tam* suits against the States. Concluding that Congress did not authorize such suits, the Court has no cause to engage in an Eleventh Amendment inquiry, and appropriately leaves that issue open.

I do not find in the False Claims Act any clear statement subjecting the States to *qui tam* suits brought by private parties, and therefore concur in the Court's resolution of the statutory question. See *ante,* at 787–788. I note, however, that the clear statement rule applied to private suits against a State has not been applied when the United States is the plaintiff. See, *e. g., Sims* v. *United States,* 359 U. S. 108, 112 (1959) (state agency ranks as a "person" subject to suit by the United States under federal tax levy provision); *United States* v. *California,* 297 U. S. 175, 186–187 (1936) (state-owned railway ranks as a "common carrier" under Federal Safety Appliance Act subject suit for penalties by the United States). I read the Court's decision to leave open the question whether the word "person" encompasses States when the United States itself sues under the False Claims Act.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

In 1986, Congress amended the False Claims Act (FCA or Act) to create a new procedure known as a "civil investigative demand," which allows the Attorney General to obtain documentary evidence "for the purpose of ascertaining whether any person is or has been engaged in" a violation of the Act—including a violation of 31 U. S. C. § 3729. The 1986 amendments also declare that a "person" who could engage in a violation of § 3729—thereby triggering the civil investigative demand provision—includes "any State or political subdivision of a State." See § 6(a), 100 Stat. 3168 (codified at 31 U. S. C. §§ 3733(*l*)(1)(A), (2), (4)). In my view, this statutory text makes it perfectly clear that Congress intended the term "person" in § 3729 to include States. This understanding is supported by the legislative history of the 1986 amendments, and is fully consistent with this Court's construction of federal statutes in cases decided before those amendments were enacted.

Since the FCA was amended in 1986, however, the Court has decided a series of cases that cloak the States with an increasingly protective mantle of "sovereign immunity" from liability for violating federal laws. It is through the lens of those post-1986 cases that the Court has chosen to construe the statute at issue in this case. To explain my disagreement with the Court, I shall comment on pre-1986 cases, the legislative history of the 1986 amendments, and the statutory text of the FCA—all of which support the view that Congress understood States to be included within the meaning of the word "person" in § 3729. I shall then briefly explain why the State's constitutional defenses fail, even under the Court's post-1986 construction of the doctrine of sovereign immunity.

## I

Cases decided before 1986 uniformly support the proposition that the broad language used in the FCA means what it says. Although general statutory references to "persons" are not normally construed to apply to the enacting sovereign, *United States* v. *Mine Workers*, 330 U. S. 258, 275 (1947), when Congress uses that word in federal statutes enforceable by the Federal Government or by a federal agency, it applies to States and state agencies as well as to private individuals and corporations. Thus, for example, the word "person" in the Sherman Act does not include the sovereign that enacted the statute (the Federal Government), *United States* v. *Cooper Corp.*, 312 U. S. 600 (1941), but it does include the States, *Georgia* v. *Evans*, 316 U. S. 159 (1942). Similarly, States are subject to regulation as a "person" within the meaning of the Shipping Act of 1916, *California* v. *United States*, 320 U. S. 577 (1944), and as a "common carrier" within the meaning of the Safety Appliance Act, *United States* v. *California*, 297 U. S. 175 (1936). In the latter case, the State of California "invoke[d] the canon of construction that a sovereign is presumptively not intended to be bound" by a statute unless the Act expressly declares that to be the case. *Id.*, at 186. We rejected the applicability of that canon, stating:

> "We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial." *Id.*, at 186–187.[1]

The False Claims Act is also all-embracing in scope, national in its purpose, and as capable of being violated by state as by individual action.[2] It was enacted during the Civil War, shortly after a congressional committee had decried the "fraud and peculation" by state officials in connection with the procurement of military supplies and Government contracts—specifically mentioning the purchases of supplies by the States of Illinois, Indiana, New York, and Ohio. See H. R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii–a, pp. xxxviii–xxxix (1862). Although the FCA was not enacted until the following year, the Court of Appeals for the Second Circuit correctly observed that "it is difficult to suppose that when Congress considered the bills leading to the 1863 Act a year later it either meant to exclude the States from the 'persons' who were to be liable for presentation of false claims to the federal government or had forgotten the results of this extensive investigation." 162 F. 3d 195, 206 (1998). That observation is faithful to the broad construction of the Act that this Court consistently endorsed in cases decided before 1986 (and hardly requires any "suspension of disbelief" as the majority supposes, *ante*, at 783, n. 12).

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[1] The difference between the post-1986 lens through which the Court views sovereign immunity issues, on the one hand, and the actual intent of Congress in statutes like the one before us today, on the other hand, is well illustrated by the congressional rejection of the holdings in *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U. S. 96 (1989), and *United States* v. *Nordic Village, Inc.*, 503 U. S. 30 (1992). In those cases, the Court refused to find the necessary unequivocal waiver of sovereign immunity against both the States and the Federal Government in § 106(c) of the Bankruptcy Code.

Congress, however, thought differently: "In enacting section 106(c), Congress intended . . . to make the States subject to a money judgment. But the Supreme Court in *Hoffman* v. *Connecticut Department of Income Maintenance*, 492 U. S. 96 (1989), held [otherwise.] In using such a narrow construction, the Court . . . did not find in the text of the statute an 'unmistakenly clear' intent of Congress to waive sovereign immunity . . . . The Court applied this reasoning in *United States* v. *Nordic Village, Inc.*" See 140 Cong. Rec. 27693 (1994). Congress therefore overruled both of those decisions by enacting the current version of 11 U. S. C. § 106.

[2] It is thus at the opposite pole from the statute construed in *Wilson* v. *Omaha Tribe*, 442 U. S. 653 (1979), which held that the term "white person" did not include the State of Iowa because "it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States." *Id.*, at 668.

Thus, in *United States* v. *Neifert-White Co.*, 390 U. S. 228, 232 (1968), after noting that the Act was passed as a result of investigations of the fraudulent use of federal funds during the Civil War, we inferred "that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." See also *Rainwater* v. *United States*, 356 U. S. 590, 592 (1958) ("It seems quite clear that the objective of Congress [in the FCA] was broadly to protect the funds and property of the Government from fraudulent claims"); H. R. Rep. No. 99–660, p. 18 (1986) ("[T]he False Claims Act is used as . . . the primary vehicle by the Government for recouping losses suffered through fraud"). Indeed, the fact that Congress has authorized *qui tam* actions by private individuals to supplement the remedies available to the Federal Government provides additional evidence of its intent to reach all types of fraud that cause financial loss to the Federal Government. Finally, the breadth of the "claims" to which the FCA applies[3] only confirms the notion that the law was intended to cover the full range of fraudulent acts, including those perpetrated by States.[4]

The legislative history of the 1986 amendments discloses that both federal and state officials understood that States were "persons" within the meaning of the statute. Thus, in a section of the 1986 Senate Report describing the history of the Act, the committee unequivocally stated that the Act reaches all parties who may submit false claims and that "[t]he term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S. Rep. No. 99–345, pp. 8–9.[5]

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[3] Title 31 U. S. C. § 3729(c) reads: "For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."

[4] When Congress amended the FCA in 1986, it noted that "[e]vidence of fraud in Government programs and procurement is on a steady rise." H. R. Rep. No. 99–660, at 18. And at that time, federal grants to state and local governments had totaled over $108 billion. See U. S. Dept. of Commerce National Data Book and Guide to Sources, Statistical Abstract of the United States 301 (108th ed. 1988) (compiling data from 1986). It is therefore difficult to believe, as the Court contends, that Congress intended "to cover all types of *fraud,* [but not] all types of *fraudsters,*" *ante,* at 781, n. 10, a conclusion that would exclude from coverage such a large share of potential fraud.

[5] Petitioner argues that the Senate Report's statement was simply inaccurate, because the three cases to which the Report cited for support did not interpret the meaning of the word "person" in the FCA. Brief for Petitioner 25–26. The cases stand for the proposition that the statutory term "person" may include States and local governments—exactly the proposition I have discussed above. See *supra,* at 790. Petitioner's observation that none of the cases cited is directly on point only indicates

Indeed, a few federal courts had accepted jurisdiction in *qui tam* cases brought by the States—thus indicating their view that States were included among the "persons" who may bring *qui tam* actions as relators under § 3730(b)(1). See *United States ex rel. Woodard* v. *Country View Care Center, Inc.*, 797 F. 2d 888 (CA10 1986); *United States ex rel. Wisconsin* v. *Dean*, 729 F. 2d 1100 (CA7 1984); see also *United States ex rel. Hartigan* v. *Palumbo Bros., Inc.*, 797 F. Supp. 624 (ND Ill. 1992). Not only do these cases express the view of those federal judges who thought a State could be a "person" under § 3730(b)(1), but the cases also demonstrate that the States considered themselves to be statutory "persons." In fact, in the *Dean* case, the United States filed a statement with the court explicitly stating its view that "[t]he State is a proper relator." 729 F. 2d, at 1103, n. 2. And when the Seventh Circuit in that case dismissed Wisconsin's *qui tam* claim on grounds unrelated to the definition

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that the Senate's understanding was based on an analogy rather than on controlling precedent.

Petitioner further argues that the text of the FCA as it was originally enacted in 1863 could not have included States as "persons," and therefore the Senate's understanding of the pre-1986 Act was erroneous. See also *ante*, at 778. Assuming for argument's sake that the Senate incorrectly ascertained what Congress meant in 1863, petitioner's argument is beside the point. The term "person" in § 3729(a) that we are interpreting today was enacted by the 1986 Congress, not by the 1863 Congress. See 100 Stat. 3153 (deleting entirely the previously existing introductory clause in § 3729, including the phrase "[a] person not a member of an armed force of the United States" and replacing it with the new phrase "[a]ny person"). Therefore, even if the 1986 Congress were mistaken about what a *previous* Legislature had meant by the word "person," it clearly expressed its own view that when the *1986 Congress itself* enacted the word "person" (and not merely the word "any" as the Court insists, *ante*, at 783, n. 12), it meant the reference to include States. There is not the least bit of contradiction (as the Court suggests, *ibid.*) in one Congress informing itself of the general understanding of a statutory term it enacts based on its own (perhaps erroneous) understanding of what a past Congress thought the term meant.

of the word "person," the National Association of Attorneys General adopted a resolution urging Congress to make it easier for States to be relators.[6] When Congress amended the FCA in 1986—and enacted the word "person" in § 3729 at issue here—it had all of this information before it, *i. e.*, that federal judges had accepted States as relators (and hence as "persons"); that the States considered themselves to be statutory "persons" and wanted greater freedom to be "persons" who could sue under the Act; and that the United States had taken a like position. See S. Rep. No. 99–345, at 12–13.

In sum, it is quite clear that when the 1986 amendments were adopted, there was a general understanding that States and state agencies were "persons" within the meaning of the Act.

## II

The text of the 1986 amendments confirms the pre-existing understanding. The most significant part of the amendments is the enactment of a new § 3733 granting authority to the Attorney General to issue a civil investigative demand (CID) before commencing a civil proceeding on behalf of the United States. A series of interwoven definitions in § 3733 unambiguously demonstrates that a State is a "person" who can violate § 3729.

Section 3733 authorizes the Attorney General to issue a CID when she is conducting a "false claims law investigation." § 3733(a). A "false claims law investigation" is defined as an investigation conducted "for the purpose of ascertaining whether *any person* is or has been engaged in any violation of a false claims law." § 3733(*l*)(2) (emphasis added). And a "false claims law" includes § 3729—the provision at issue in this case. § 3733(*l*)(1)(A). Quite plainly, these provisions contemplate that any "person" may be engaged in a violation of § 3729. Finally, a "person" is defined to include "any State or political subdivision of a State." § 3733(*l*)(4). Hence, the CID provisions clearly state that a "person" who may be "engaged in any violation of a false claims law," including § 3729, includes a "State or a political subdivision of a State."[7] These CID provisions thus unmistakably express Congress' understanding that a State may be a "person" who can violate § 3729.

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[6] Congress adopted the suggestion of the Attorneys General in § 3730(e)(4)(A).

Elsewhere in the False Claims Act the term "person" includes States as well. For example, § 3730 of the Act—both before and after the 1986 amendments—uses the word "person" twice. First, subsection (a) of § 3730 directs the Attorney General to investigate violations of § 3729, and provides that if she "finds that a *person* has violated or is violating" that section, she may bring a civil action "under this section against the *person.*" (Emphases added.) Second, subsection (b) of § 3730 also uses the word "person," though for a different purpose; in that subsection the word is used to describe the plaintiffs who may bring *qui tam* actions on behalf of themselves and the United States.

Quite clearly, a State is a "person" against whom the Attorney General may proceed under § 3730(a).[8] And as I noted earlier, see *supra,* at 794, before 1986 States were considered "persons" who could bring a *qui tam* action as a relator under § 3730(b)—and the Court offers nothing to question that understanding. See *ante,* at 787, n. 18. Moreover, when a *qui tam* relator brings an action on behalf of the United States, he or she is, in effect, authorized to act as an assignee of the Federal Government's claim. See *ante,* at 773. Given that understanding, combined with the fact that § 3730(a) does not make any distinction between possible defendants against whom the Attorney General may bring an action, the most normal inference to draw is that *qui tam* actions may be brought by relators against the same category of "persons" that may be sued by the Attorney General.

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[7] Because this concatenation of definitions expressly references and incorporates § 3729, it is no answer that the definitions listed in § 3733 apply, by their terms, "[f]or the purposes of" § 3733.

[8] JUSTICE GINSBURG, who joins in the Court's judgment, is careful to point out that the Court does not disagree with this reading of § 3730(a). *Ante,* at 789.

To recapitulate, it is undisputed that (under the CID provision) a State is a "person" who may violate § 3729; that a State is a "person" who may be named as a defendant in an action brought by the Attorney General; and that a State is a "person" who may bring a *qui tam* action on behalf of the United States. It therefore seems most natural to read the adjacent uses of the term "person" in §§ 3729, 3730(a), 3730(b), and 3733 to cover the same category of defendants. See *United States* v. *Cooper Corp.*, 312 U. S., at 606 ("It is hardly credible that Congress used the term 'person' in different senses in the same sentence"). And it seems even more natural to read the single word "person" (describing who may commit a violation under § 3729) to have one consistent meaning regardless of whether the action against that violator is brought under § 3730(a) or under § 3730(b). See *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a single formulation . . . the same way each time it is called into play" (citation omitted)). Absent powerful arguments to the contrary, it should follow that a State may be named as a defendant in an action brought by an assignee of the United States. Rather than pointing to any such powerful arguments, however, the Court comes to a contrary conclusion on the basis of an inapplicable presumption and rather strained inferences drawn from three different statutory provisions.

The Court's principal argument relies on "our longstanding interpretive presumption that 'person' does not include the sovereign." *Ante*, at 780. As discussed earlier, that "presumption" does not quite do the heavy lifting the Court would like it to do. What's more, the doctrinal origins of that "presumption" meant only that the *enacting sovereign* was not normally thought to be a statutory "person." See, *e. g., United States* v. *California,* 297 U. S., at 186 ("[T]he canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it . . . has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. The presumption is an aid to consistent construction of statutes of the *enacting sovereign* when their purpose is in doubt" (emphasis added)); see also *United States* v. *Mine Workers,* 330 U. S., at 275; *United States* v. *Fox,* 94 U. S. 315, 321 (1877); *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58, 73 (1989) (Brennan, J., dissenting). The reason for presuming that an enacting sovereign does not intend to authorize litigation against itself simply does not apply to federal statutes that apply equally to state agencies and private entities. Finally, the "affirmative showing" the Court would require to demonstrate that the word "person" includes States, *ante,* at 781, is plainly found in the statutory text discussed above.

The Court's first textual argument is based on the fact that the definition of the term "person" included in § 3733's CID provision expressly includes States. "The presence of such a definitional provision in § 3733," the Court argues, "together with the absence of such a provision from the definitional provisions contained in § 3729 . . . suggests that States are not 'persons' for purposes of *qui tam* liability under § 3729." *Ante,* at 784. Leaving aside the fact that § 3733's definition actually cuts in the opposite direction, see *supra,* at 795–796, this argument might carry some weight if the definitional provisions in § 3729 included *some* definition of "person" but simply neglected to mention States. But the definitional provisions in § 3729 do not include any definition of "person" at all. The negative inference drawn by the Court, if taken seriously, would therefore prove too much. The definition of "person" in § 3733 includes not only States, but also "any natural person, partnership, corporation, association, or other legal entity." § 3733(*l*)(4). If the premise of the Court's argument were correct—that the inclusion of certain items as a "person" in § 3733 implies their exclusion as a "person" in § 3729—then there would be *absolutely no one left* to be a "person" under § 3729.[9] It is far more reasonable to assume that Congress simply saw no need to add a definition of "person" in § 3729 because (as both the legislative history, see *supra*, at 791–795, and the definitions in the CID provisions demonstrate) the meaning of the term "person" was already well understood. Congress likely thought it unnecessary to include a definition in § 3729 itself.

The Court also relies on the definition of "person" in a separate, but similar, statute, the Program Fraud Civil Remedies Act of 1986 (PFCRA). *Ante*, at 786. The definition of "person" found in that law includes "any individual, partnership, corporation, association, or private organization." 31 U. S. C. § 3801(a)(6). It is first worth pointing out the obvious: Although the PFCRA sits next to the FCA in the United States Code, they are separate statutes. It is therefore not altogether clear why the former has much bearing on the latter.[10] Regardless, the Court's whole argument about the PFCRA rests entirely on the premise that its definition of "person" does not include States. That premise, in turn, relies upon the fact that § 3801(a)(6) in the PFCRA defines a "person" to include "any individual, partnership, corporation, association, or private organization," but does not mention States. We have, however, interpreted similar definitions of "person," which included corporations, partnerships, and associations, to include States as well, even though States were not expressly mentioned in the statutory definition. See *California* v. *United States,* 320 U. S., at 585; *Georgia* v. *Evans,* 316 U. S., at 160. (I draw no definitive conclusions as to whether States are subject to suit under the PFCRA; I only mean to suggest that the Court's premise is not as obvious as it presumes it to be.) In any event, the ultimate relevant question is whether the text and legislative history *of the FCA* make it clear that § 3729's use of the word "person" includes States. Because they do, nothing in any other piece of legislation narrows the meaning of that term.

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[9] Not so, the Court says, because natural persons and other entities, unlike States, are *presumed* to be included within the term "person." *Ante*, at 784, n. 14. In other words, this supposedly independent textual argument does nothing on its own without relying entirely on the presumption already discussed. See *supra*, at 797–798; *ante*, at 780–784. The negative inference adds nothing on its own.

[10] Indeed, reliance on the PFCRA seems to contradict the Court's central premise—that in 1863 the word "person" did not include States and that scattered intervening amendments have done nothing to change that. *Ante*, at 781–782. If that were so, the relevant meaning of the word

Finally, the Court relies on the fact that the current version of the FCA includes a treble damages remedy that is "essentially punitive in nature." *Ante,* at 784. Citing *Newport* v. *Fact Concerts, Inc.,* 453 U. S. 247, 262–263 (1981), the Court invokes the "presumption against imposition of punitive damages on governmental entities." *Ante,* at 785. But as *Newport* explains, "courts vie[w] punitive damages [against governmental bodies] as contrary to sound public policy, because such awards would burden the very tax-

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"person" would be the meaning adopted by the 1863 Congress, not the 1986 Congress. And on that premise, why should it matter what a different Congress, in a different century, did in a separate statute? Of course, as described earlier, see n. 5, *supra,* I believe it is the 1986 Congress' understanding of the word "person" that controls, because it is that word *as enacted by the 1986 Congress* that we are interpreting in this case. But on the Court's premise, it is the 1863 Congress' understanding that controls and the PFCRA should be irrelevant.

payers and citizens for whose benefit the wrongdoer was being chastised." 453 U. S., at 263. That rationale is inapplicable here. The taxpaying "citizens for whose benefit" the FCA is designed are the citizens of the United States, not the citizens of any individual State that might violate the Act. It is true, of course, that the taxpayers of a State that violates the FCA will ultimately bear the burden of paying the treble damages. It is not the coffers of the State (and hence state taxpayers), however, that the FCA is designed to protect, but the coffers of the National Government (and hence the federal taxpayers). Accordingly, a treble damages remedy against a State does not "burden the very taxpayers" the statute was designed to protect.[11]

## III

Each of the constitutional issues identified in the Court's opinion requires only a brief comment. The historical evidence summarized by the Court, *ante*, at 774–778, is obviously sufficient to demonstrate that *qui tam* actions are "cases" or "controversies" within the meaning of Article III. That evidence, together with the evidence that private prosecutions were commonplace in the 19th century, see *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 127–128, and nn. 24–25 (1998) (STEVENS, J., concurring in judgment), is also sufficient to resolve the Article II question that the Court has introduced *sua sponte*, *ante*, at 778, n. 8.

As for the State's "Eleventh Amendment" sovereign immunity defense, I adhere to the view that *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996), was wrongly decided. See *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 97–99 (2000) (STEVENS, J., dissenting); *Seminole Tribe*, 517 U. S., at 100–185 (SOUTER, J., dissenting). Accordingly, Congress' clear intention to subject States to *qui tam* actions is also sufficient to abrogate any common-law defense of sovereign immunity. Moreover, even if one accepts *Seminole Tribe* as controlling, the State's immunity claim would still fail. Given the facts that (1) respondent is, in effect, suing as an assignee of the United States, *ante,* at 773; (2) the Eleventh Amendment does not provide the States with a defense to claims asserted by the United States, see, *e. g., United States* v. *Mississippi,* 380 U. S. 128, 140 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States"); and (3) the Attorney General retains significant control over a relator's action, see 162 F. 3d, at 199–201 (case below), the Court of Appeals correctly affirmed the District Court's order denying petitioner's motion to dismiss. Compare *New Hampshire* v. *Louisiana,* 108 U. S. 76 (1883), with *South Dakota* v. *North Carolina,* 192 U. S. 286 (1904).[12] I would, accordingly, affirm the judgment of the Court of Appeals.

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[11] It is also worth mentioning that treble damages may be reduced to double damages if the court makes the requisite findings under §§ 3729(a)(7)(A)–(C).

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[12] The agency argues that this is essentially an "end run" around the Eleventh Amendment. Brief for Petitioner 33. It is not at all clear to me, though, why a *qui tam* action would be considered an "end run" around that Amendment, yet precisely the same form of action is not an "end run" around Articles II and III.

Syllabus

# UNITED STATES ET AL. v. PLAYBOY ENTERTAINMENT GROUP, INC.

## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

No. 98–1682. Argued November 30, 1999—Decided May 22, 2000

Section 505 of the Telecommunications Act of 1996 requires cable television operators providing channels "primarily dedicated to sexually-oriented programming" either to "fully scramble or otherwise fully block" those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as between 10 p.m. and 6 a.m. Even before § 505's enactment, cable operators used signal scrambling to limit access to certain programs to paying customers. Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as "signal bleed." The purpose of § 505 is to shield children from hearing or seeing images resulting from signal bleed. To comply with § 505, the majority of cable operators adopted the "time channeling" approach, so that, for two-thirds of the day, no viewers in their service areas could receive the programming in question. Appellee Playboy Entertainment Group, Inc., filed this suit challenging § 505's constitutionality. A three-judge District Court concluded that § 505's content-based restriction on speech violates the First Amendment because the Government might further its interests in less restrictive ways. One plausible, less restrictive alternative could be found in § 504 of the Act, which requires a cable operator, "[u]pon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block" any channel the subscriber does not wish to receive. As long as subscribers knew about this opportunity, the court reasoned, § 504 would provide as much protection against unwanted programming as would § 505.

*Held:* Because the Government failed to prove § 505 is the least restrictive means for addressing a real problem, the District Court did not err in holding the statute violative of the First Amendment. Pp. 811–827.

(a) Two points should be understood: (1) Many adults would find the material at issue highly offensive, and considering that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it; and (2) Playboy's programming has First Amendment protection.

Section 505 is a content-based regulation. It also singles out particular programmers for regulation. It is of no moment that the statute does not impose a complete prohibition. Since § 505 is content based, it can stand only if it satisfies strict scrutiny. *E. g., Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126. It must be narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. Cable television, like broadcast media, presents unique problems, but even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be obtained by a less restrictive alternative. There is, moreover, a key difference between cable television and the broadcasting media: Cable systems have the capacity to block unwanted channels on a household-by-household basis. Targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests. Pp. 811–815.

(b) No one disputes that § 504 is narrowly tailored to the Government's goal of supporting parents who want sexually explicit channels blocked. The question here is whether § 504 can be effective. Despite empirical evidence that § 504 generated few requests for household-by-household blocking during a period when it was the sole federal blocking statute in effect, the District Court correctly concluded that § 504, if publicized in an adequate manner, could serve as an effective, less restrictive means of reaching the Government's goals. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *E. g., Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 183. Of three explanations for the lack of individual blocking requests under § 504—(1) individual blocking might not be an effective alternative, due to technological or other limitations; (2) although an adequately advertised blocking provision might have been effective, § 504 as written does not require sufficient notice to make it so; and (3) the actual signal bleed problem might be far less of a concern than the Government at first had supposed—the Government had to show that the first was the right answer. According to the District Court, however, the first and third possibilities were "equally consistent" with the record before it, and the record was not clear as to whether enough notice had been issued to give § 504 a fighting chance. Unless the District Court's findings are clearly erroneous, the tie goes to free expression. With regard to signal bleed itself, the District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard evidence of how widespread or how serious the problem is. There is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. Under § 505, sanctionable signal bleed can include instances as fleeting as an image appearing on a screen for just a few seconds. The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this. The Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban. The Government also failed to prove § 504, with adequate notice, would be ineffective. There is no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they are not yet aware of it) and about their rights to have the bleed blocked (if they consider it a problem and have not yet controlled it themselves). A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act. The Government also argues society's independent interests will be unserved if parents fail to act on that information. Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. The regulatory alternative of a publicized § 504, which has the real possibility of promoting more open disclosure and the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The Government has not shown that this alternative would be insufficient to secure its objective, or that any overriding harm justifies its intervention. Although, under a voluntary blocking regime, even with adequate notice, some children will be exposed to signal bleed, children will also be exposed under time channeling, which does not eliminate signal bleed around the clock. The record is silent as to the comparative effectiveness of the two alternatives. Pp. 816–826.

30 F. Supp. 2d 702, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., *post*, p. 828, and THOMAS, J., *post*, p. 829, filed concurring opinions. SCALIA, J., filed a dissenting opinion, *post*, p. 831. BREYER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined, *post*, p. 835.

*James A. Feldman* argued the cause for appellants. With him on the briefs were *Solicitor General Waxman, Acting*

*Assistant Attorney General Schultz, Deputy Solicitor General Kneedler, Jacob M. Lewis, Edward Himmelfarb,* and *Christopher J. Wright.*

*Robert Corn-Revere* argued the cause for appellees. With him on the brief were *Jean S. Moore* and *Burton Joseph.**

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents a challenge to § 505 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. § 561 (1994 ed., Supp. III). Section 505 requires cable television operators who provide channels "primarily dedicated to sexually-oriented programming" either to "fully scramble or otherwise fully block" those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m. 47 U. S. C. § 561(a) (1994 ed., Supp. III); 47 CFR § 76.227 (1999). Even before enactment of the statute, signal scrambling was already in use. Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs. Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as "signal bleed." The purpose of § 505 is to shield children from hearing or seeing images resulting from signal bleed.

To comply with the statute, the majority of cable operators adopted the second, or "time channeling," approach. The effect of the widespread adoption of time channeling was to eliminate altogether the transmission of the targeted programming outside the safe harbor period in affected cable service areas. In other words, for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.

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**Janet M. LaRue, Paul J. McGeady,* and *Bruce Taylor* filed a brief for the Family Research Council et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger;* for the Media Institute by *Laurence H. Winer;* for the National Cable Television Association by *Daniel L. Brenner* and *Michael S. Schooler;* for Sexuality Scholars, Researchers, Educators, and Therapists by *Marjorie Heins* and *Joan E. Bertin;* and for the Thomas Jefferson Center for the Protection of Free Expression by *J. Joshua Wheeler.*

Appellee Playboy Entertainment Group, Inc., challenged the statute as unnecessarily restrictive content-based legislation violative of the First Amendment. After a trial, a three-judge District Court concluded that a regime in which viewers could order signal blocking on a household-by-household basis presented an effective, less restrictive alternative to § 505. 30 F. Supp. 2d 702, 719 (Del. 1998). Finding no error in this conclusion, we affirm.

## I

Playboy Entertainment Group owns and prepares programs for adult television networks, including Playboy Television and Spice. Playboy transmits its programming to cable television operators, who retransmit it to their subscribers, either through monthly subscriptions to premium channels or on a so-called "pay-per-view" basis. Cable operators transmit Playboy's signal, like other premium channel signals, in scrambled form. The operators then provide paying subscribers with an "addressable converter," a box placed on the home television set. The converter permits the viewer to see and hear the descrambled signal. It is conceded that almost all of Playboy's programming consists of sexually explicit material as defined by the statute.

The statute was enacted because not all scrambling technology is perfect. Analog cable television systems may use either "RF" or "baseband" scrambling systems, which may not prevent signal bleed, so discernible pictures may appear from time to time on the scrambled screen. Furthermore, the listener might hear the audio portion of the program.

These imperfections are not inevitable. The problem is that at present it appears not to be economical to convert simpler RF or baseband scrambling systems to alternative scrambling technologies on a systemwide scale. Digital technology may one day provide another solution, as it presents no bleed problem at all. Indeed, digital systems are projected to become the technology of choice, which would eliminate the signal bleed problem. Digital technology is not yet in widespread use, however. With imperfect scrambling, viewers who have not paid to receive Playboy's channels may happen across discernible images of a sexually explicit nature. How many viewers, how discernible the scene or sound, and how often this may occur are at issue in this case.

Section 505 was enacted to address the signal bleed phenomenon. As noted, the statute and its implementing regulations require cable operators either to scramble a sexually explicit channel in full or to limit the channel's programming to the hours between 10 p.m. and 6 a.m. 47 U. S. C. § 561 (1994 ed., Supp. III); 47 CFR § 76.227 (1999). Section 505 was added by floor amendment, without significant debate, to the Telecommunications Act of 1996 (Act), a major legislative effort designed "to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.'" *Reno* v. *American Civil Liberties Union,* 521 U. S. 844, 857 (1997) (quoting 110 Stat. 56). "The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives." *Reno, supra,* at 858. Section 505 is found in Title V of the Act, which is itself known as the Communications Decency Act of 1996 (CDA). 110 Stat. 133. Section 505 was to become effective on March 9, 1996, 30 days after the Act was signed by the President. Note following 47 U. S. C. § 561 (1994 ed., Supp. III).

On March 7, 1996, Playboy obtained a temporary restraining order (TRO) enjoining the enforcement of § 505. 918 F. Supp. 813 (Del.), and brought this suit in a three-judge District Court pursuant to § 561 of the Act, 110 Stat. 142, note following 47 U. S. C. § 223 (1994 ed., Supp. III). Playboy sought a declaration that § 505 violates the Constitution and an injunction prohibiting the law's enforcement. The District Court denied Playboy a preliminary injunction, 945 F. Supp. 772 (Del. 1996), and we summarily affirmed, 520 U. S. 1141 (1997). The TRO was lifted, and the Federal Communications Commission announced it would begin enforcing § 505 on May 18, 1997. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 12 FCC Rcd. 5212, 5214 (1997).

When the statute became operative, most cable operators had "no practical choice but to curtail [the targeted] programming during the [regulated] sixteen hours or risk the penalties imposed . . . if any audio or video signal bleed occur[red] during [those] times." 30 F. Supp. 2d, at 711. The majority of operators—"in one survey, 69%"—complied with § 505 by time channeling the targeted programmers. *Ibid.* Since "30 to 50% of all adult programming is viewed by households prior to 10 p.m.," the result was a significant restriction of communication, with a corresponding reduction in Playboy's revenues. *Ibid.*

In March 1998, the District Court held a full trial and concluded that § 505 violates the First Amendment. *Id.*, at 702. The District Court observed that § 505 imposed a content-based restriction on speech. *Id.*, at 714–715. It agreed that the interests the statute advanced were compelling but concluded the Government might further those interests in less restrictive ways. *Id.*, at 717–720. One plausible, less restrictive alternative could be found in another section of the Act: § 504, which requires a cable operator, "[u]pon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block" any channel the subscriber does not wish to receive. 110 Stat. 136, 47 U. S. C. § 560 (1994 ed., Supp. III). As long as subscribers knew about this opportunity, the court reasoned, § 504 would provide as much protection against unwanted programming as would § 505. 30 F. Supp. 2d, at 718–720. At the same time, § 504 was content neutral and would be less restrictive of Playboy's First Amendment rights. *Ibid.*

The court described what "adequate notice" would include, suggesting

> "[operators] should communicate to their subscribers the information that certain channels broadcast sexually-oriented programming; that signal bleed . . . may appear; that children may view signal bleed without their parents' knowledge or permission; that channel blocking devices . . . are available free of charge . . . ; and that a request for a free device . . . can be made by a telephone call to the [operator]." *Id.*, at 719.

The means of providing this notice could include

> "inserts in monthly billing statements, barker channels (preview channels of programming coming up on Pay-Per-View), and on-air advertisement on channels other than the one broadcasting the sexually explicit programming." *Ibid.*

The court added that this notice could be "conveyed on a regular basis, at reasonable intervals," and could include notice of changes in channel alignments. *Ibid.*

The District Court concluded that § 504 so supplemented would be an effective, less restrictive alternative to § 505, and consequently declared § 505 unconstitutional and enjoined its enforcement. *Id.*, at 719–720. The court also required Playboy to insist on these notice provisions in its contracts with cable operators. *Ibid.*

The United States filed a direct appeal in this Court pursuant to § 561. The District Court thereafter dismissed for lack of jurisdiction two post-trial motions filed by the Government. App. to Juris. Statement 91a–92a. We noted probable jurisdiction, 527 U. S. 1021 (1999), and now affirm.

## II

Two essential points should be understood concerning the speech at issue here. First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it. Second, all parties bring the case to us on the premise that Playboy's programming has First Amendment protection. As this case has been litigated, it is not alleged to be obscene; adults have a constitutional right to view it; the Government disclaims any interest in preventing children from seeing or hearing it with the consent of their parents; and Playboy has concomitant rights under the First Amendment to transmit it. These points are undisputed.

The speech in question is defined by its content; and the statute which seeks to restrict it is content based. Section 505 applies only to channels primarily dedicated to "sexually explicit adult programming or other programming that is indecent." The statute is unconcerned with signal bleed from any other channels. See 945 F. Supp., at 785 ("[Section 505] does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel"). The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. Section 505 is not " 'justified without reference to the content of the regulated speech.' " *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288, 293 (1984)). It "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." *Boos* v. *Barry,* 485 U. S. 312, 321 (1988) (opinion of O'CONNOR, J.). This is the essence of content-based regulation.

Not only does § 505 single out particular programming content for regulation, it also singles out particular programmers. The speech in question was not thought by Congress to be so harmful that all channels were subject to restriction. Instead, the statutory disability applies only to channels "primarily dedicated to sexually-oriented programming." 47 U. S. C. § 561(a) (1994 ed., Supp. III). One sponsor of the measure even identified appellee by name. See 141 Cong. Rec. 15587 (1995) (statement of Sen. Feinstein) (noting the statute would apply to channels "such as the Playboy and Spice channels"). Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. Section 505 limited Playboy's market as a penalty for its programming choice, though other channels capable of transmitting like material are altogether exempt.

The effect of the federal statute on the protected speech is now apparent. It is evident that the only reasonable way for a substantial number of cable operators to comply with the letter of § 505 is to time channel, which silences the protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewers. According to the District Court, "30 to 50% of all adult programming is viewed by households prior to 10 p.m.," when the safe-harbor period begins. 30 F. Supp. 2d, at 711. To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection. It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.

Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 126 (1989). If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. *Ibid.* If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. *Reno,* 521 U. S., at 874 ("[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *Sable Communications, supra,* at 126 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.

Our precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities "simply by averting [our] eyes." *Cohen* v. *California,* 403 U. S. 15, 21 (1971); accord, *Erznoznik* v. *Jacksonville,* 422 U. S. 205, 210–211 (1975). Here, of course, we consider images transmitted to some homes where they are not wanted and where parents often are not present to give immediate guidance. Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts. See *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727, 744 (1996) (plurality opinion); *id.,* at 804–805 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part); *FCC* v. *Pacifica Foundation,* 438

U. S. 726 (1978). No one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent. The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny. This case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.

In *Sable Communications,* for instance, the feasibility of a technological approach to controlling minors' access to "dial-a-porn" messages required invalidation of a complete statutory ban on the medium. 492 U. S., at 130–131. And, while mentioned only in passing, the mere possibility that user-based Internet screening software would " 'soon be widely available' " was relevant to our rejection of an overbroad restriction of indecent cyberspeech. *Reno, supra,* at 876–877. Compare *Rowan* v. *Post Office Dept.,* 397 U. S. 728, 729–730 (1970) (upholding statute "whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative' " (quoting then 39 U. S. C. § 4009(a) (1964 ed., Supp. IV))), with *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 75 (1983) (rejecting blanket ban on the mailing of unsolicited contraceptive advertisements). Compare also *Ginsberg* v. *New York,* 390 U. S. 629, 631 (1968) (upholding state statute barring the sale to minors of material defined as "obscene on the basis of its appeal to them"), with *Butler* v. *Michigan,* 352 U. S. 380, 381 (1957) (rejecting blanket ban of material " 'tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth' " (quoting then Mich. Penal Code § 343)). Each of these cases arose in a different context—*Sable Communica-*

*tions* and *Reno*, for instance, also note the affirmative steps necessary to obtain access to indecent material via the media at issue—but they provide necessary instruction for complying with accepted First Amendment principles.

Our zoning cases, on the other hand, are irrelevant to the question here. *Post*, at 838 (BREYER, J., dissenting) (citing *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), and *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976)). We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. *Reno, supra*, at 867–868; *Boos*, 485 U. S., at 320–321. The statute now before us burdens speech because of its content; it must receive strict scrutiny.

There is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis. The option to block reduces the likelihood, so concerning to the Court in *Pacifica, supra*, at 744, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests. This is not to say that the absence of an effective blocking mechanism will in all cases suffice to support a law restricting the speech in question; but if a less restrictive means is available for the Government to achieve its goals, the Government must use it.

## III

The District Court concluded that a less restrictive alternative is available: § 504, with adequate publicity. 30 F. Supp. 2d, at 719–720. No one disputes that § 504, which requires cable operators to block undesired channels at individual households upon request, is narrowly tailored to the Government's goal of supporting parents who want those channels blocked. The question is whether § 504 can be effective.

When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here. In support of its position, the Government cites empirical evidence showing that § 504, as promulgated and implemented before trial, generated few requests for household-by-household blocking. Between March 1996 and May 1997, while the Government was enjoined from enforcing § 505, § 504 remained in operation. A survey of cable operators determined that fewer than 0.5% of cable subscribers requested full blocking during that time. *Id.*, at 712. The uncomfortable fact is that § 504 was the sole blocking regulation in effect for over a year; and the public greeted it with a collective yawn.

The District Court was correct to direct its attention to the import of this tepid response. Placing the burden of proof upon the Government, the District Court examined whether § 504 was capable of serving as an effective, less restrictive means of reaching the Government's goals. *Id.*, at 715, 718–719. It concluded that § 504, if publicized in an adequate manner, could be. *Id.*, at 719–720.

The District Court employed the proper approach. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 183 (1999) ("[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Reno,* 521 U. S., at 879 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . ."); *Edenfield* v. *Fane,* 507 U. S. 761, 770–771 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 480 (1989) ("[T]he State bears the burden of justifying its restrictions . . ."); *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503, 509 (1969) ("In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. "Content-based regulations are presumptively invalid," *R. A. V.* v. *St. Paul,* 505 U. S. 377, 382 (1992), and the Government bears the burden to rebut that presumption.

This is for good reason. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of nonpersuasion—operative in all trials—must rest with the Government, not with the citizen. *Id.*, at 526.

With this burden in mind, the District Court explored three explanations for the lack of individual blocking requests. 30 F. Supp. 2d, at 719. First, individual blocking might not be an effective alternative, due to technological or other limitations. Second, although an adequately advertised blocking provision might have been effective, § 504 as written did not require sufficient notice to make it so. Third, the actual signal bleed problem might be far less of a concern than the Government at first had supposed. *Ibid.*

To sustain its statute, the Government was required to show that the first was the right answer. According to the District Court, however, the first and third possibilities were "equally consistent" with the record before it. *Ibid.* As for the second, the record was "not clear" as to whether enough notice had been issued to give § 504 a fighting chance. *Ibid.* The case, then, was at best a draw. Unless the District Court's findings are clearly erroneous, the tie goes to free expression.

The District Court began with the problem of signal bleed itself, concluding "the Government has not convinced us that [signal bleed] is a pervasive problem." *Id.*, at 708–709, 718. The District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard evidence of how widespread or how serious the problem of signal bleed is. Indeed, there is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another. Under § 505, sanctionable signal bleed can include instances as fleeting as an image appearing on a screen for just a few seconds. The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this. Although the parties have taken the additional step of lodging with the Court an assortment of videotapes, some of which show quite explicit bleeding and some of which show television static or snow, there is no attempt at explanation or context; there is no discussion, for instance, of the extent to which any particular tape is representative of what appears on screens nationwide.

The Government relied at trial on anecdotal evidence to support its regulation, which the District Court summarized as follows:

> "The Government presented evidence of two city councillors, eighteen individuals, one United States Senator, and the officials of one city who complained either to their [cable operator], to their local Congressman, or to the FCC about viewing signal bleed on television. In each instance, the local [cable operator] offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity. Included in the complaints was the additional concern that other parents might not be aware that their children are exposed to this problem. In addition, the Government presented evidence of a child exposed to signal bleed at a friend's house. Cindy Omlin set the lockout feature on her remote control to prevent her child from tuning to adult channels, but her eleven year old son was nevertheless exposed to signal bleed when he attended a slumber party at a friend's house.
>
> "The Government has presented evidence of only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting. The Government has not presented any survey-type evidence on the magnitude of the 'problem.'" *Id.*, at 709 (footnote and record citations omitted).

Spurred by the District Court's express request for more specific evidence of the problem, see 945 F. Supp., at 779, n. 16, the Government also presented an expert's spreadsheet estimate that 39 million homes with 29.5 million children had the potential to be exposed to signal bleed, 30 F. Supp. 2d, at 708–709. The Government made no attempt to confirm the accuracy of its estimate through surveys or other field tests, however. Accordingly, the District Court discounted the figures and made this finding: "[T]he Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed." *Id.*, at

709. The finding is not clearly erroneous; indeed it is all but required.

Once § 505 went into effect, of course, a significant percentage of cable operators felt it necessary to time channel their sexually explicit programmers. *Id.*, at 711, and n. 14. This is an indication that scrambling technology is not yet perfected. That is not to say, however, that scrambling is completely ineffective. Different cable systems use different scrambling systems, which vary in their dependability. "The severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance." *Id.*, at 708. At even the good end of the spectrum a system might bleed to an extent sufficient to trigger the time-channeling requirement for a cautious cable operator. (The statute requires the signal to be "*fully* block[ed]." 47 U. S. C. § 561(a) (1994 ed., Supp. III) (emphasis added).) A rational cable operator, faced with the possibility of sanctions for intermittent bleeding, could well choose to time channel even if the bleeding is too momentary to pose any concern to most households. To affirm that the Government failed to prove the existence of a problem, while at the same time observing that the statute imposes a severe burden on speech, is consistent with the analysis our cases require. Here, there is no probative evidence in the record which differentiates among the extent of bleed at individual households and no evidence which otherwise quantifies the signal bleed problem.

In addition, market-based solutions such as programmable televisions, VCR's, and mapping systems (which display a blue screen when tuned to a scrambled signal) may eliminate signal bleed at the consumer end of the cable. 30 F. Supp. 2d, at 708. Playboy made the point at trial that the Government's estimate failed to account for these factors. *Id.*, at 708–709. Without some sort of field survey, it is impossible to know how widespread the problem in fact is, and the only indicator in the record is a handful of complaints. Cf.

*Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180, 187 (1997) (reviewing " 'a record of tens of thousands of pages' of evidence" developed through "three years of pre-enactment hearings, . . . as well as additional expert submissions, sworn declarations and testimony, and industry documents" in support of complex must-carry provisions). If the number of children transfixed by even flickering pornographic television images in fact reached into the millions we, like the District Court, would have expected to be directed to more than a handful of complaints.

No support for the restriction can be found in the near barren legislative record relevant to this provision. Section 505 was added to the Act by floor amendment, accompanied by only brief statements, and without committee hearing or debate. See 141 Cong. Rec. 15586–15589 (1995). One of the measure's sponsors did indicate she considered time channeling to be superior to voluntary blocking, which "put[s] the burden of action on the subscriber, not the cable company." *Id.*, at 15587 (statement of Sen. Feinstein). This sole conclusory statement, however, tells little about the relative efficacy of voluntary blocking versus time channeling, other than offering the unhelpful, self-evident generality that voluntary measures require voluntary action. The Court has declined to rely on similar evidence before. See *Sable Communications,* 492 U. S., at 129–130 ("[A]side from conclusory statements during the debates by proponents of the bill, . . . the congressional record presented to us contains no evidence as to *how* effective or ineffective the . . . regulations were or might prove to be" (footnote omitted)); *Reno,* 521 U. S., at 858, and n. 24, 875–876, n. 41 (same). This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.

Nor did the District Court err in its second conclusion. The Government also failed to prove § 504 with adequate notice would be an ineffective alternative to § 505. Once again, the District Court invited the Government to produce its proof. See 945 F. Supp., at 781 ("If the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505. At the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us"). Once again, the Government fell short. See 30 F. Supp. 2d, at 719 ("[The Government's argument that § 504 is ineffective] is premised on adequate notice to subscribers. It is not clear, however, from the record that notices of the provisions of § 504 have been adequate"). There is no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they are not yet aware of it) and about their rights to have the bleed blocked (if they consider it a problem and have not yet controlled it themselves).

The Government finds at least two problems with the conclusion of the three-judge District Court. First, the Government takes issue with the District Court's reliance, without proof, on a "hypothetical, enhanced version of Section 504." Brief for Appellants 32. It was not the District Court's obligation, however, to predict the extent to which an improved notice scheme would improve § 504. It was for the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective, and § 505 to be the least restrictive available means. Indeed, to the extent the District Court erred, it was only in attempting to implement the less restrictive alternative through judicial decree by requiring Playboy to provide for expanded notice in its cable service contracts. The appropriate remedy was not to repair the statute, it was to enjoin the speech restriction. Given the existence of a less restrictive means, if the Legislature wished to improve its statute, perhaps in the process giving careful consideration to other alternatives, it then could do so.

The Government also contends a publicized § 504 will be just as restrictive as § 505, on the theory that the cost of installing blocking devices will outstrip the revenues from distributing Playboy's programming and lead to its cancellation. See 30 F. Supp. 2d, at 713. This conclusion rests on the assumption that a sufficient percentage of households, informed of the potential for signal bleed, would consider it enough of a problem to order blocking devices—an assumption for which there is no support in the record. *Id.*, at 719. It should be noted, furthermore, that Playboy is willing to incur the costs of an effective § 504. One might infer that Playboy believes an advertised § 504 will be ineffective for its object, or one might infer the company believes the signal bleed problem is not widespread. In the absence of proof, it is not for the Court to assume the former.

It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act. If unresponsive operators are a concern, moreover, a notice statute could give cable operators ample incentive, through fines or other penalties for noncompliance, to respond to blocking requests in prompt and efficient fashion.

Having adduced no evidence in the District Court showing that an adequately advertised § 504 would not be effective to aid desirous parents in keeping signal bleed out of their own households, the Government can now cite nothing in the record to support the point. The Government instead takes quite a different approach. After only an offhand suggestion that the success of a well-communicated § 504 is "highly unlikely," the Government sets the point aside, arguing instead that society's independent interests will be unserved if parents fail to act on that information. Brief for Appellants 32–33 ("[U]nder . . . an enhanced version of Section 504, parents who had strong feelings about the matter could see to it that their children did not view signal bleed—at least in their own homes"); *id.*, at 33 ("Even an enhanced version of Section 504 would succeed in blocking signal bleed only if, and after, parents affirmatively decided to avail themselves of the means offered them to do so. There would certainly be parents—perhaps a large number of parents—who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a relatively easy solution"); Reply Brief for Appellants 12 ("[Society's] interest would of course be served in instances . . . in which parents request blocking under an enhanced Section 504. But in cases in which parents fail to make use of an enhanced Section 504 procedure out of distraction, inertia, or indifference, Section 505 would be the only means to protect society's independent interest").

Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. The Government's argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded. The assumptions have not been established; and in any event the assumptions apply only in a regime where the option of blocking has not been explained. The whole point of a publicized § 504 would be to advise parents that indecent material may be shown and to afford them an opportunity to block it at all times, even when they are not at home and even after 10 p.m. Time channeling does not offer this assistance. The regulatory alternative of a publicized § 504, which has the real possibility of promoting more open disclosure and the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The Government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.

There can be little doubt, of course, that under a voluntary blocking regime, even with adequate notice, some children will be exposed to signal bleed; and we need not discount the possibility that a graphic image could have a negative impact on a young child. It must be remembered, however, that children will be exposed to signal bleed under time channeling as well. Time channeling, unlike blocking, does not eliminate signal bleed around the clock. Just as adolescents may be unsupervised outside of their own households, it is hardly unknown for them to be unsupervised in front of the television set after 10 p.m. The record is silent as to the comparative effectiveness of the two alternatives.

* * *

Basic speech principles are at stake in this case. When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression. We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause. If television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the

Government can address. It must do so, however, in a way consistent with First Amendment principles. Here the Government has not met the burden the First Amendment imposes.

The Government has failed to show that § 505 is the least restrictive means for addressing a real problem; and the District Court did not err in holding the statute violative of the First Amendment. In light of our ruling, it is unnecessary to address the second question presented: whether the District Court was divested of jurisdiction to consider the Government's postjudgment motions after the Government filed a notice of appeal in this Court. The judgment of the District Court is affirmed.

*It is so ordered.*

## APPENDIX TO OPINION OF THE COURT

Section 505 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. § 561 (1994 ed., Supp. III), provides in relevant part:

> "(a) Requirement
>
> "In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.
>
> "(b) Implementation
>
> "Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission)

> when a significant number of children are likely to view it.
>
> "(c) 'Scramble' defined
>
> "As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner."

Section 504 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. § 560 (1994 ed., Supp. III), provides in relevant part:

> "(a) Subscriber request
>
> "Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.
>
> "(b) 'Scramble' defined
>
> "As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner."

JUSTICE STEVENS, concurring.

Because JUSTICE SCALIA has advanced an argument that the parties have not addressed, a brief response is in order. Relying on *Ginzburg* v. *United States*, 383 U. S. 463 (1966), JUSTICE SCALIA would treat programs whose content is, he assumes, protected by the First Amendment as though they were obscene because of the way they are advertised. The four separate dissenting opinions in *Ginzburg*, authored by Justices Black, Harlan, Douglas, and Stewart, amply demonstrated the untenable character of the *Ginzburg* decision when it was rendered. The *Ginzburg* theory of obscenity is a legal fiction premised upon a logical bait and switch; advertising a bareheaded dancer as "topless" might be deceptive, but it would not make her performance obscene.

As I explained in my dissent in *Splawn* v. *California*, 431 U. S. 595, 602 (1977), *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). JUSTICE SCALIA's proposal is thus not only anachronistic, it also overlooks a key premise upon which our commercial speech cases are based. The First Amendment assumes that, as a general matter, "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.*, at 770. The very fact that the programs marketed by Playboy are offensive to many viewers provides a justification for protecting, not penalizing, truthful statements about their content.

JUSTICE THOMAS, concurring.

It would seem to me that, with respect to at least some of the cable programming affected by § 505 of the Telecommunications Act of 1996, the Government has ample constitutional and statutory authority to prohibit its broadcast entirely. A governmental restriction on the distribution of obscene materials receives no First Amendment scrutiny. *Roth* v. *United States*, 354 U. S. 476, 485 (1957). Though perhaps not all of the programming at issue in the case is obscene as this Court defined the term in *Miller* v. *California*, 413 U. S. 15, 24 (1973), one could fairly conclude that, under the standards applicable in many communities, some of the programming meets the *Miller* test. If this is so, the Government is empowered by statute to sanction these broadcasts with criminal penalties. See 47 U. S. C. § 559 (1994 ed., Supp. III) ("Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under title 18 or imprisoned not more than 2 years, or both").*

However, as the Court points out, this case has been litigated on the assumption that the programming at issue is *not* obscene, but merely indecent. We have no factual finding that any of the materials at issue are, in fact, obscene. Indeed, the District Court described the materials as indecent but not obscene. 945 F. Supp. 772, 774, n. 4 (Del. 1996). The Government does not challenge that characterization in this Court, Tr. of Oral Arg. 9–10, but instead asks this Court to ratify the statute on the assumption that this is protected speech. I am unwilling, in the absence of factual findings or advocacy of the position, to rely on the view that some of the relevant programming is obscene.

What remains then is the assumption that the programming restricted by § 505 is not obscene, but merely indecent. The Government, having declined to defend the statute as a regulation of obscenity, now asks us to dilute our stringent First Amendment standards to uphold § 505 as a proper regulation of protected (rather than unprotected) speech. See Brief for Appellants 18–29 (arguing that traditional strict scrutiny does not apply). I am unwilling to corrupt the First Amendment to reach this result. The "starch" in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government. See *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727, 774 (1996) (SOUTER, J., concurring) ("Reviewing

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*I am referring, here, to unscrambled programming on the Playboy and Spice channels, examples of which were lodged with the Court. The Government also lodged videotapes containing signal bleed from these channels. I assume that if the unscrambled programming on these channels is obscene, any scrambled but discernible images from the programs would be obscene as well. In fact, some of the examples of signal bleed contained in the record may fall within our definition of obscenity more easily than would the unscrambled programming because it is difficult to dispute that signal bleed "lacks serious literary, artistic, political, or scientific value." *Miller* v. *California,* 413 U. S. 15, 24 (1973).

speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said"). Applying the First Amendment's exacting standards, the Court has correctly determined that § 505 cannot be upheld on the theory argued by the Government. Accordingly, I join the opinion of the Court.

JUSTICE SCALIA, dissenting.

I agree with the principal dissent in this case that § 505 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. § 561 (1994 ed., Supp. III), is supported by a compelling state interest and is narrowly tailored. I write separately to express my view that § 505 can be upheld in simpler fashion: by finding that it regulates the business of obscenity.

To be sure, § 505 and the Federal Communications Commission's implementing regulation, see 47 CFR § 76.227 (1999), purport to capture programming that is indecent rather than merely that which is obscene. And I will assume for purposes of this discussion (though it is a highly fanciful assumption) that none of the transmissions at issue independently crosses the boundary we have established for obscenity, see *Miller* v. *California*, 413 U. S. 15, 24 (1973), so that the individual programs themselves would enjoy First Amendment protection. In my view, however, that assumption does not put an end to the inquiry.

We have recognized that commercial entities which engage in "the sordid business of pandering" by "deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed," engage in constitutionally unprotected behavior. *Ginzburg* v. *United States*, 383 U. S. 463, 467, 472 (1966); see also *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 257–258 (1990) (SCALIA, J., concurring in part and dissenting in part); *Pinkus* v. *United States*, 436 U. S. 293, 303–304 (1978); *Splawn* v. *California*, 431 U. S. 595, 597–599 (1977); *Hamling* v. *United States,* 418 U. S. 87, 130 (1974). Cf. *Jacobellis* v. *Ohio,* 378 U. S. 184, 201 (1964) (Warren, C. J., dissenting) ("In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene"). This is so whether or not the products in which the business traffics independently meet the high hurdle we have established for delineating the obscene, viz., that they contain no "serious literary, artistic, political, or scientific value." *Miller, supra,* at 24. See *Ginzburg,* 383 U. S., at 471. We are more permissive of government regulation in these circumstances because it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value. "The deliberate representation of petitioner's publications as erotically arousing . . . stimulate[s] the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." *Id.,* at 470. Thus, a business that "(1) offer[s] . . . hardcore sexual material, (2) as a constant and intentional objective of [its] business, [and] (3) seek[s] to promote it as such" finds no sanctuary in the First Amendment. *FW/PBS, supra,* at 261 (SCALIA J., concurring in part and dissenting in part).

Section 505 regulates just this sort of business. Its coverage is limited to programming that "describes or depicts sexual or excretory activities or organs *in a patently offensive manner* as measured by contemporary community standards [for cable television]." 47 CFR § 76.227(d) (1999) (emphasis added). It furthermore applies only to those channels that are "*primarily dedicated* to sexually-oriented programming."[1] § 505(a) (emphasis added). It is conceivable, I suppose, that a channel which is primarily dedicated to sex might not *hold itself forth* as primarily dedicated to sex—in which case its productions which contain "serious literary, artistic, political, or scientific value" (if any) would be as entitled to First Amendment protection as the statuary rooms of the National Gallery. But in the competitive world of cable programming, the possibility that a channel devoted to sex would not advertise itself as such is sufficiently remote, and the number of such channels sufficiently small (if not indeed nonexistent), as not to render the provision substantially overbroad.[2]

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[1] Congress's attempt to limit the reach of § 505 is therefore, contrary to the Court's contention, see *ante,* at 812, a virtue rather than a vice.

Playboy itself illustrates the type of business § 505 is designed to reach. Playboy provides, through its networks—Playboy Television, AdulTVision, Adam & Eve, and Spice—

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[2] JUSTICE STEVENS misapprehends in several respects the nature of the test I would apply. First, he mistakenly believes that the nature of the advertising controls the obscenity analysis, regardless of the nature of the material being advertised. I entirely agree with him that "advertising a bareheaded dancer as 'topless' might be deceptive, but it would not make her performance obscene." *Ante,* at 828–829 (concurring opinion). I believe, however, that *if* the material is "patently offensive" *and* it is being advertised as such, we have little reason to think it is being proffered for its socially redeeming value.

JUSTICE STEVENS's second misapprehension flows from the first: He sees the test I would apply as incompatible with the Court's commercial-speech jurisprudence. See *ante,* at 829 (concurring opinion); see also *Splawn* v. *California,* 431 U. S. 595, 603, n. 2 (1977) (STEVENS, J., dissenting) ("*Ginzburg* cannot survive [*Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976)]"). There is no such conflict. Although the *Ginzburg* test, like most obscenity tests, has ordinarily been applied in a commercial context (most purveyors of obscenity are in the business for the money), its logic is not restricted to that context. The test applies equally to the improbable case in which a collector of indecent materials wishes to give them away, and takes out a classified ad in the local newspaper touting their salacious appeal. Commercial motive or not, the "'[c]ircumstances of . . . dissemination are relevant to determining whether [the] social importance claimed for [the] material [is] . . . pretense or reality.'" *Splawn, supra,* at 598 (quoting jury instruction approved). Perhaps this is why the Court in *Splawn* did not accept JUSTICE STEVENS's claim of incompatibility.

"virtually 100% sexually explicit adult programming." 30 F. Supp. 2d 702, 707 (Del. 1998). For example, on its Spice network, Playboy describes its own programming as depicting such activities as "female masturbation/external," "girl/girl sex," and "oral sex/cunnilingus." 1 Record, Exh. 73, p. TWC00132. As one would expect, given this content, Playboy advertises accordingly, with calls to "Enjoy the sexiest, hottest adult movies in the privacy of your own home." 6 *id.*, Exh. 136, at 2P009732. An example of the promotion for a particular movie is as follows: "Little miss country girls are aching for a quick roll in the hay! Watch southern hospitality pull out all the stops as these ravin' nymphos tear down the barn and light up the big country sky." 7 *id.*, Exh. 226, at 2P009187. One may doubt whether—or marvel that—this sort of embarrassingly juvenile promotion really attracts what Playboy assures us is an "adult" audience. But it is certainly marketing sex.[3]

Thus, while I agree with JUSTICE BREYER's child-protection analysis, it leaves me with the same feeling of true-but-inadequate as the conclusion that Al Capone did not accurately report his income. It is not only children who can be protected from occasional uninvited exposure to what appellee calls "adult-oriented programming"; we can all be. Section 505 covers only businesses that engage in the "commercial exploitation of erotica solely for the sake of their prurient appeal," *Ginzburg,* 383 U. S., at 466—which, as Playboy's own advertisements make plain, is what "adult" programming is all about. In most contexts, contemporary American society has chosen to permit such commercial exploitation. That may be a wise democratic choice, if only because of the difficulty in many contexts (though not this one) of identifying the panderer to sex. It is, however, not a course compelled by the Constitution. Since the Government is entirely free to *block* these transmissions, it may certainly take the less drastic step of dictating how, and during what times, they may occur.

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[3] Both the Court, see *ante*, at 811, and JUSTICE THOMAS, see *ante*, at 830 (concurring opinion), find great importance in the fact that "this case has been litigated on the assumption that the programming at issue is not obscene, but merely indecent," see *ibid.* (emphasis deleted). But as I noted in *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 262–263 (1990) (opinion concurring in part and dissenting in part), we have not allowed the parties' litigating positions to place limits upon our development of obscenity law. See, *e. g.*, *Miller* v. *California*, 413 U. S. 15, 24–25 (1973) (abandoning "utterly without redeeming social value" test *sua sponte*); *Ginzburg* v. *United States*, 383 U. S. 463 (1966) (adopting pandering theory unargued by the Government); *Mishkin* v. *New York*, 383 U. S. 502 (1966) (upholding convictions on theory that obscenity could be defined by looking to the intent of the disseminator, despite respondent's express disavowal of that theory). As for JUSTICE THOMAS's concern that there has been no factual finding of obscenity in this case, see *ante*, at 830 (concurring opinion): This is not an as-applied challenge, in which the issue is whether a particular course of conduct constitutes obscenity; it is a facial challenge, in which the issue is whether the terms of this statute address obscenity. That is not for the factfinder below, but for this Court.

JUSTICE BREYER, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

This case involves the application, not the elucidation, of First Amendment principles. We apply established First Amendment law to a statute that focuses upon the broadcast of "sexually explicit adult programming" on AdulTVision, Adam & Eve, Spice, and Playboy cable channels. These channels are, as the statute requires, "primarily dedicated to sexually-oriented programming." Telecommunications Act of 1996, Pub. L. 104–104, § 505(a), 110 Stat. 136, 47 U. S. C. § 561(a) (1994 ed., Supp. III). Section 505 prohibits cable operators from sending these adult channels into the homes of viewers who do not request them. In practice, it requires a significant number of cable operators either to upgrade their scrambling technology or to avoid broadcasting these channels during daylight and evening hours (6 a.m. to 10 p.m.). We must decide whether the First Amendment permits Congress to enact this statute.

The basic, applicable First Amendment principles are not at issue. The Court must examine the statute before us with great care to determine whether its speech-related restrictions are justified by a "compelling interest," namely, an interest in limiting children's access to sexually explicit material. In doing so, it recognizes that the Legislature must respect adults' viewing freedom by "narrowly tailoring" the statute so that it restricts no more speech than necessary, and choosing instead any alternative that would further the compelling interest in a "less restrictive" but "at least as effective" way. See *ante,* at 813; *Reno* v. *American Civil Liberties Union,* 521 U. S. 844, 874 (1997).

Applying these principles, the majority invalidates § 505 for two reasons. It finds that (1) the "Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban," *ante,* at 823, and (2) the "Government . . . failed to prove" the "ineffective[ness]" of an alternative, namely, notified viewers requesting that the broadcaster of sexually explicit material stop sending it, *ibid.* In my view, the record supports neither reason.

## I

At the outset, I would describe the statutory scheme somewhat differently than does the majority. I would emphasize three background points. First, the statutory scheme reflects more than a congressional effort to control incomplete scrambling. Previously, federal law had left cable operators free to decide whether, when, and how to transmit adult channels. Most channel operators on their own had decided not to send adult channels into a subscriber's home except on request. But the operators then implemented that decision with inexpensive technology. Through signal "bleeding," the scrambling technology (either inadvertently or by way of enticement) allowed nonsubscribers to see and hear what was going on. That is why Congress decided to act.

In 1995, Senator Dianne Feinstein, the present statute's legislative cosponsor, pointed out that "numerous cable operators across the country are still automatically broadcasting sexually explicit programming into households across America, regardless of whether parents want this or subscribers want it." 141 Cong. Rec. 15588. She complained that the "industry has only taken baby steps to address this problem through voluntary policies that simply recommend action," *ibid.*, adding that the "problem is that there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television," *id.*, at 15587. She consequently proposed, and Congress enacted, the present statute.

The statute is carefully tailored to respect viewer preferences. It regulates transmissions by creating two "default rules" applicable unless the subscriber decides otherwise. Section 504 requires a cable operator to "fully scramble" any channel (whether or not it broadcasts adult programming) *if* a subscriber asks *not* to receive it. Section 505 requires a cable operator to "fully scramble" every adult channel *unless* a subscriber asks to receive it. Taken together, the two provisions create a scheme that permits subscribers to choose to see what they want. But each law creates a different "default" assumption about silent subscribers. Section 504 assumes a silent subscriber wants to see the ordinary (nonadult) channels that the cable operator includes in the paid-for bundle sent into the home. Section 505 assumes that a silent subscriber does not want to receive adult channels. Consequently, a subscriber wishing to view an adult channel must "opt in," and specifically request that channel. See § 505. A subscriber wishing not to view any other channel (sent into the home) must "opt out." See § 504.

The scheme addresses signal bleed but only indirectly. From the statute's perspective signal "bleeding"—*i. e.*, a failure to fully "rearrange the content of the signal . . . so that the programming cannot be viewed or heard in an understandable manner," § 504(c)—amounts to transmission into a home. Hence "bleeding" violates the statute whenever a clear transmission of an unrequested adult channel would violate the statute.

Second, the majority's characterization of this statutory scheme as "prohibit[ing] . . . speech" is an exaggeration. *Ante*, at 812. Rather, the statute places a *burden* on adult channel speech by requiring the relevant cable operator either to use better scrambling technology, or, if that technology is too expensive, to broadcast only between 10 p.m. and 6 a.m. Laws that burden speech, say, by making speech less profitable, may create serious First Amendment issues, but they are not the equivalent of an absolute ban on speech itself. Cf. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377 (2000). Thus, this Court has upheld laws that do not ban the access of adults to sexually explicit speech, but burden that access through geographical or temporal zoning. See, *e. g., Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). This Court has also recognized that material the First Amendment guarantees adults the right to see may not be suitable for children. And it has consequently held that legislatures maintain a limited power to protect children by restricting access to, but not banning, adult material. Compare *Ginsberg* v. *New York*, 390 U. S. 629 (1968) (upholding ban on sale of pornographic magazines to minors), with *Butler* v. *Michigan*, 352 U. S. 380 (1957) (invalidating ban on all books unfit for minors); see also *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 737–753 (1996) (plurality opinion); *Pacifica Foundation*, *supra*, at 748–750; *Reno*, *supra*, at 887–889 (O'CONNOR, J., concurring in part and dissenting in part). The difference—between imposing a burden and enacting a ban—can matter even when strict First Amendment rules are at issue.

Third, this case concerns only the regulation of commercial actors who broadcast "virtually 100% sexually explicit" material. 30 F. Supp. 2d 702, 707 (Del. 1998). The channels do not broadcast more than trivial amounts of more serious material such as birth control information, artistic images, or the visual equivalents of classical or serious literature. This case therefore does not present the kind of narrow tailoring concerns seen in other cases. See, *e. g., Reno,* 521 U. S., at 877–879 ("The breadth of the [statutue's] coverage is wholly unprecedented. . . . [It] cover[s] large amounts of nonpornographic material with serious educational or other value"); *Butler, supra,* at 381–384 (invalidating ban on books "'tending to the corruption of the morals of youth'").

With this background in mind, the reader will better understand my basic disagreement with each of the Court's two conclusions.

## II

The majority first concludes that the Government failed to prove the seriousness of the problem—receipt of adult channels by children whose parents did not request their broadcast. *Ante,* at 819–822. This claim is flat-out wrong. For one thing, the parties concede that basic RF scrambling does not scramble the audio portion of the program. 30 F. Supp. 2d, at 707. For another, Playboy itself conducted a survey of cable operators who were asked: "Is your system in full compliance with Section 505 (no discernible audio or video bleed)?" To this question, 75% of cable operators answered "no." See Def. Exh. 254, 2 Record 2. Further, the Government's expert took the number of homes subscribing to Playboy or Spice, multiplied by the fraction of cable households with children and the average number of children per household, and found 29 million children are potentially exposed to audio and video bleed from adult programming. Def. Exh. 82, 10 Record 11–12. Even discounting by 25% for systems that might be considered in full compliance, this left 22 million children in homes with faulty scrambling systems. See *id.*, at 12. And, of course, the record contains additional anecdotal evidence and the concerns expressed by elected officials, probative of a larger problem. See 30 F. Supp. 2d, at 709, and n. 10; see also 141 Cong. Rec. 15586 (1995).

I would add to this empirical evidence the majority's own statement that "*most* cable operators had 'no practical choice but to curtail'" adult programming by switching to nighttime only transmission of adult channels. *Ante,* at 809 (emphasis added) (quoting 30 F. Supp. 2d, at 711). *If signal bleed is not a significant empirical problem, then why, in light of the cost of its cure, must so many cable operators switch to nighttime hours?* There is no realistic answer to this question. I do not think it realistic to imagine that signal bleed occurs just enough to make cable operators skittish, without also significantly exposing children to these images. See *ante,* at 821.

If, as the majority suggests, the signal bleed problem is not significant, then there is also no significant burden on speech created by § 505. The majority cannot have this evidence both ways. And if, given this logical difficulty and the quantity of empirical evidence, the majority still believes that the Government has not proved its case, then it imposes a burden upon the Government beyond that suggested in any other First Amendment case of which I am aware.

## III

The majority's second claim—that the Government failed to demonstrate the absence of a "less restrictive alternative"—presents a closer question. The specific question is whether § 504's "opt-out" amounts to a "less restrictive," but *similarly* practical and *effective,* way to accomplish § 505's child-protecting objective. As *Reno* tells us, a "less restrictive alternativ[e]" must be "at least as effective in achieving the legitimate purpose that the statute was enacted to serve." 521 U. S., at 874.

The words I have just emphasized, "similarly" and "effective," are critical. In an appropriate case they ask a judge not to apply First Amendment rules mechanically, but to decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection).

These words imply a degree of leeway, however small, for the Legislature when it chooses among possible alternatives in light of predicted comparative effects. Without some such empirical leeway, the undoubted ability of lawyers and judges to imagine *some* kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being. As Justice Blackmun pointed out, a "judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois Bd. of Elections* v. *Socialist Workers Party,* 440 U. S. 173, 188–189 (1979) (concurring opinion). Used without a sense of the practical choices that face legislatures, "the test merely announces an inevitable [negative] result, and the test is no test at all." *Id.,* at 188.

The majority, in describing First Amendment jurisprudence, scarcely mentions the words "at least as effective"—a rather surprising omission since they happen to be what this case is all about. But the majority does refer to *Reno*'s understanding of less restrictive alternatives, *ante,* at 813, and it addresses the Government's effectiveness arguments, *ante,* at 823–826. I therefore assume it continues to recognize their role as part of the test that it enunciates.

I turn then to the major point of disagreement. Unlike the majority, I believe the record makes clear that § 504's opt-out is not a similarly effective alternative. Section 504 (opt-out) and § 505 (opt-in) work differently in order to achieve very different legislative objectives. Section 504 gives parents the power to tell cable operators to keep any channel out of their home. Section 505 does more. Unless parents explicitly consent, it inhibits the transmission of adult cable channels to children whose parents may be unaware of what they are watching, whose parents cannot easily supervise television viewing habits, whose parents do not know of their § 504 "opt-out" rights, or whose parents are simply unavailable at critical times. In this respect, § 505 serves the same interests as the laws that deny children access to adult cabarets or X-rated movies. *E. g.,* Del. Code Ann., Tit. 11, § 1365(i)(2) (1995); D. C. Code Ann. § 22–2001(b)(1)(B) (1996). These laws, and § 505, all act in the absence of direct parental supervision.

This legislative objective is perfectly legitimate. Where over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week, and where children may spend afternoons and evenings watching television outside of the home with friends, § 505 offers independent protection for a large number of families. See U. S. Dept. of Education, Office of Research and Improvement, Bringing Education into the After-School Hours 3 (summer 1999). I could not disagree more when the majority implies that the Government's independent interest in offering such protection—preventing, say, an 8-year-old child from watching virulent pornography without parental consent—might not be "compelling." *Ante,* at 825. No previous case in which the protection of children was at issue has suggested any such thing. Indeed, they all say precisely the opposite. See *Reno, supra,* at 865 (State has an "independent interest in the well-being of its youth"); *Denver Area,* 518 U. S., at 743; *New York* v. *Ferber,* 458 U. S. 747, 756–757 (1982); *Ginsberg,* 390 U. S., at 640; *Prince* v. *Massachusetts,* 321 U. S. 158, 165 (1944). They make clear that Government has a compelling interest in helping parents by preventing minors from accessing sexually explicit materials in the absence of parental supervision. See *Ginsberg, supra,* at 640.

By definition, § 504 does *nothing at all* to further the compelling interest I have just described. How then is it a similarly effective § 505 alternative?

The record, moreover, sets forth empirical evidence showing that the two laws are not equivalent with respect to the Government's objectives. As the majority observes, during the 14 months the Government was enjoined from enforcing § 505, "fewer than 0.5% of cable subscribers requested full blocking" under § 504. *Ante,* at 816. The majority describes this public reaction as "a collective yawn," *ibid.*, adding that the Government failed to prove that the "yawn" reflected anything other than the lack of a serious signal bleed problem or a lack of notice which better information about § 504 might cure. The record excludes the first possibility—at least in respect to exposure, as discussed above. See *supra,* at 839–840. And I doubt that the public, though it may well consider the viewing habits of *adults* a matter of personal choice, would "yawn" when the exposure in question concerns young children, the absence of parental consent, and the sexually explicit material here at issue. See *ante,* at 833–834 (SCALIA, J., dissenting).

Neither is the record neutral in respect to the curative power of better notice. Section 504's opt-out right works only when parents (1) become aware of their § 504 rights, (2) discover that their children are watching sexually explicit signal "bleed," (3) reach their cable operator and ask that it block the sending of its signal to their home, (4) await installation of an individual blocking device, and, perhaps (5) (where the block fails or the channel number changes) make a new request. Better notice of § 504 rights does little to help parents discover their children's viewing habits (step 2). And it does nothing at all in respect to steps 3 through 5. Yet the record contains considerable evidence that those problems matter, *i. e.*, evidence of endlessly delayed phone call responses, faulty installations, blocking failures, and other mishaps, leaving those steps as significant § 504 obstacles. See, *e. g.*, Deposition of J. Cavalier in Civ. Action No. 96–94, pp. 17–18 (D. Del., Dec. 5, 1997) ("It's like calling any utilities; you sit there, and you wait and wait on the phone . . . . [It took] [t]hree weeks, numerous phone calls. . . . [E]very time I call Cox Cable . . . I get different stories"); Telephonic Deposition of M. Bennett, *id.*, at 10–11 (D. Del., Dec. 9, 1997) ("After two [failed installations,] no, I don't recall calling them again. I just said well, I guess this is something I'm going to have to live with").

Further, the District Court's actual plan for "better notice"—the only plan that makes concrete the majority's "better notice" requirement—is fraught with difficulties. The District Court ordered Playboy to insist that cable operators place notice of § 504 in "inserts in monthly billing statements, barker channels . . . and on-air advertising." 30 F. Supp. 2d, at 719. But how can one say that placing one more insert in a monthly billing statement stuffed with others, or calling additional attention to adult channels through a "notice" on "barker" channels, will make more than a small difference? More importantly, why would doing so not interfere to some extent with the cable operators' own freedom to decide what to broadcast? And how is the District Court to supervise the contracts with thousands of cable operators that are to embody this requirement?

Even if better notice did adequately inform viewers of their § 504 rights, exercise of those rights by more than 6% of the subscriber base would itself raise Playboy's costs to the point that Playboy would be forced off the air entirely, 30 F. Supp. 2d, at 713—a consequence that would not seem to further anyone's interest in free speech. The majority, resting on its own earlier conclusion that signal bleed is not widespread, denies any likelihood that more than 6% of viewers would need § 504. But that earlier conclusion is unsound. See *supra*, at 839–840. The majority also relies on the fact that Playboy, presumably aware of its own economic interests, "is willing to incur the costs of an effective § 504." *Ante*, at 824. Yet that denial, as the majority admits, may simply reflect Playboy's knowledge that § 504, even with better notice, will not work. Section 504 is not a similarly effective alternative to § 505 (in respect to the Government's interest in protecting children), unless more than a minimal number of viewers actually use it; yet the economic evidence shows that if more than 6% do so, Playboy's programming would be totally eliminated. The majority provides no answer to this argument in its opinion—and this evidence is sufficient in and of itself to dispose of this case.

Of course, it is logically *possible* that "better notice" will bring about near perfect parental knowledge (of what children watch and § 504 opt-out rights), that cable operators will respond rapidly to blocking requests, and that still 94% of all informed parents will decided not to have adult channels blocked for free. But the *probability* that this remote *possibility* will occur is neither a "draw" nor a "tie." *Ante*, at 819. And that fact is sufficient for the Government to have met its burden of proof.

All these considerations show that § 504's opt-out, even with the Court's plan for "better notice," is *not* similarly effective in achieving the legitimate goals that the statute was enacted to serve.

## IV

Section 505 raises the cost of adult channel broadcasting. In doing so, it restricts, but does not ban, adult speech. Adults may continue to watch adult channels, though less conveniently, by watching at night, recording programs with a VCR, or by subscribing to digital cable with better blocking systems. Cf. *Renton*, 475 U. S., at 53–55 (upholding zoning rules that force potential adult theater patrons to travel to less convenient locations). The Government's justification for imposing this restriction—limiting the access of children to channels that broadcast virtually 100% "sexually explicit" material—is "compelling." The record shows no similarly effective, less restrictive alternative. Consequently § 505's restriction, viewed in light of the proposed alternative, is proportionate to need. That is to say, it restricts speech no more than necessary to further that compelling need. Taken together, these considerations lead to the conclusion that § 505 is lawful.

I repeat that my disagreement with the majority lies in the fact that, in my view, the Government has satisfied its burden of proof. In particular, it has proved both the existence of a serious problem and the comparative ineffectiveness of § 504 in resolving that problem. This disagreement is not about allocation of First Amendment burdens of proof, basic First Amendment principle, nor the importance of that Amendment to our scheme of Government. See *ante,* at 826–827. First Amendment standards are rigorous. They safeguard speech. But they also permit Congress to enact a law that increases the costs associated with certain speech, where doing so serves a compelling interest that cannot be served through the adoption of a less restrictive, similarly effective alternative. Those standards at their strictest make it difficult for the Government to prevail. But they do not make it impossible for the Government to prevail.

The majority here, however, has applied those standards without making a realistic assessment of the alternatives. It thereby threatens to leave Congress without power to help the millions of parents who do not want to expose their children to commercial pornography—but will remain ill served by the Court's chosen remedy. Worse still, the logic of the majority's "505/504" comparison (but not its holding that the problem has not been established) would seem to apply whether "bleeding" or totally unscrambled transmission is at issue. If so, the public would have to depend solely upon the voluntary conduct of cable channel operators to avert considerably greater harm.

Case law does not mandate the Court's result. To the contrary, as I have pointed out, our prior cases recognize that, where the protection of children is at issue, the First Amendment poses a barrier that properly is high, but not insurmountable. It is difficult to reconcile today's decision with our foundational cases that have upheld similar laws, such as *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), and *Ginsberg* v. *New York*, 390 U. S. 629 (1968). It is not difficult to distinguish our cases striking down such laws—either because they applied far more broadly than the narrow regulation of adult channels here, see, *e. g., Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997), imposed a total ban on a form of adult speech, see, *e. g., Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989); *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983), or because a less restrictive, similarly effective alternative was otherwise available, see, *e. g., Denver Area*, 518 U. S., at 753–760.

Nor is it a satisfactory answer to say, as does JUSTICE THOMAS, that the Government remains free to prosecute under the obscenity laws. *Ante*, at 829–830. The obscenity exception permits censorship of communication even among *adults*. See, *e. g., Miller* v. *California*, 413 U. S. 15 (1973). It must be kept narrow lest the Government improperly interfere with the communication choices that adults have freely made. To rely primarily upon law that bans speech for adults is to overlook the special need to protect children.

Congress has taken seriously the importance of maintaining adult access to the sexually explicit channels here at issue. It has tailored the restrictions to minimize their impact upon adults while offering parents help in keeping unwanted transmissions from their children. By finding "adequate alternatives" where there are none, the Court reduces Congress' protective power to the vanishing point. That is not what the First Amendment demands.

I respectfully dissent.

# JONES *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 99–5739. Argued March 21, 2000—Decided May 22, 2000

Petitioner Jones tossed a Molotov cocktail into a home owned and occupied by his cousin as a dwelling place for everyday family living. The ensuing fire severely damaged the home. Jones was convicted in the District Court of violating, *inter alia,* 18 U. S. C. § 844(i), which makes it a federal crime to "maliciously damag[e] or destro[y], . . . by means of fire or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The Seventh Circuit affirmed, rejecting Jones's contention that § 844(i), when applied to the arson of a private residence, exceeds the authority vested in Congress under the Commerce Clause.

*Held:* Because an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity, arson of such a dwelling is not subject to federal prosecution under § 844(i). Pp. 852–859.

(a) In support of its argument that § 844(i) reaches the arson of an owner-occupied private residence, the Government relies principally on the breadth of the statutory term "affecting . . . commerce," words that, when unqualified, signal Congress' intent to invoke its full Commerce Clause authority. But § 844(i) contains the qualifying words "used in" a commerce-affecting activity. The key word is "used." Congress did not define the crime as the explosion of a building whose damage or destruction might affect interstate commerce, but required that the damaged or destroyed property itself have been used in commerce or in an activity affecting commerce. The proper inquiry, therefore, is into the function of the building itself, and then into whether that function affects interstate commerce. The Court rejects the Government's argument that the Indiana residence involved in this case was constantly "used" in at least three "activit[ies] affecting commerce": (1) it was "used" as collateral to obtain and secure a mortgage from an Oklahoma lender, who, in turn, "used" it as security for the loan; (2) it was "used" to obtain from a Wisconsin insurer a casualty insurance policy, which safeguarded the interests of the homeowner and the mortgagee; and (3) it was "used" to receive natural gas from sources outside Indiana. Section 844(i)'s use-in-commerce requirement is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce. See, *e. g.*, *Bailey* v. *United States*, 516 U. S. 137, 143, 145. It surely is not the common perception that a private, owner-occupied residence is "used" in the "activity" of receiving natural gas, a mortgage, or an insurance policy. Cf. *id.*, at 145. The Government does not allege that the residence here served as a home office or the locus of any commercial undertaking. The home's only "active employment," so far as the record reveals, was for the everyday living of Jones's cousin and his family. *Russell* v. *United States*, 471 U. S. 858, 862—in which the Court held that particular property was being used in an "activity affecting commerce" under § 844(i) because its owner was renting it to tenants at the time he attempted to destroy it by fire—does not warrant a less "use"-centered reading of § 844(i) in this case. The Court there observed that "[b]y its terms," § 844(i) applies only to "property that is 'used' in an 'activity' that affects commerce," and ruled that "the rental of real estate" fits that description, *ibid.* Here, the homeowner did not use his residence in any trade or business. Were the Court to adopt the Government's expansive interpretation, hardly a building in the land would fall outside § 844(i)'s domain, and the statute's limiting language, "used in," would have no office. Judges should hesitate to treat statutory terms in any setting as surplusage, particularly when the words describe an element of a crime. *E. g.*, *Ratzlaf* v. *United States*, 510 U. S. 135, 140–141. Pp. 852–857.

(b) The foregoing reading is in harmony with the guiding principle that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter. See, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575. In holding that a statute making it a federal crime to possess a firearm within 1,000 feet of a school exceeded Congress' power to regulate commerce, this Court, in *United States* v. *Lopez*, 514 U. S. 549, stressed that the area was one of traditional state concern, see, *e. g.*, *id.*, at 561, n. 3, and that the legislation aimed at activity in which neither the actors nor their conduct had a commercial character, *e. g.*, *id.*, at 560–562. Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were the Court to read § 844(i) to render the traditionally local criminal conduct in which Jones engaged a matter for federal enforcement. *United States* v. *Bass*, 404 U. S. 336, 350. The Court's comprehension of § 844(i) is additionally reinforced by other interpretive guides. Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Rewis* v. *United States*, 401 U. S. 808, 812, and when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite, *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222. Moreover, unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes. *Bass*, 404 U. S., at 349. To read §844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. Pp. 857–858.

178 F. 3d 479, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 859. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 860.

*Donald M. Falk* argued the cause and filed briefs for petitioner.

*Deputy Solicitor General Dreeben* argued the cause for the United States. With him on the brief were *Solicitor General Waxman, Assistant Attorney General Robinson, Malcolm L. Stewart*, and *David S. Kris.**

JUSTICE GINSBURG delivered the opinion of the Court.

It is a federal crime under 18 U. S. C. §844(i) (1994 ed., Supp. IV) to damage or destroy, "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." This case presents the question whether arson of an owner-occupied private residence falls within §844(i)'s compass. Construing the statute's text, we hold that an owner-occupied residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity; arson of such a dwelling, therefore, is not subject to federal prosecution under § 844(i). Our construction of § 844(i) is reinforced by the Court's opinion in *United States* v. *Lopez,* 514 U. S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided where possible, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988).

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*Briefs of *amici curiae* urging reversal were filed for the Cato Institute by *Ronald D. Rotunda;* for the Center for the Original Intent of the Constitution by *Michael P. Farris;* for the National Association of Criminal Defense Lawyers et al. by *Jeffrey J. Pokorak* and *Barbara Bergman;* for the Pacific Legal Foundation by *Anne M. Hayes* and *M. Reed Hopper;* and for Dale Lynn Ryan by *John G. Roberts, Jr.*, and *Gregory G. Garre.*

## I

On February 23, 1998, petitioner Dewey Jones tossed a Molotov cocktail through a window into a home in Fort Wayne, Indiana, owned and occupied by his cousin. No one was injured in the ensuing fire, but the blaze severely damaged the home. A federal grand jury returned a three-count indictment charging Jones with arson, 18 U. S. C. § 844(i) (1994 ed., Supp. IV); using a destructive device during and in relation to a crime of violence (the arson), 18 U. S. C. § 924(c); and making an illegal destructive device, 26 U. S. C. § 5861(f). Jones was tried under that indictment in the Northern District of Indiana and convicted by a jury on all three counts.[1] The District Court sentenced him, pursuant to the Sentencing Reform Act of 1984, to a total prison term of 35 years, to be followed by five years of supervised release. The court also ordered Jones to pay $77,396.87 to the insurer of the damaged home as restitution for its loss. Jones appealed, and the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. 178 F. 3d 479 (1999).

Jones unsuccessfully urged, both before the District Court and on appeal to the Seventh Circuit, that § 844(i), when applied to the arson of a private residence, exceeds the authority vested in Congress under the Commerce Clause of the

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[1] The question on which we granted review refers solely to Jones's § 844(i) conviction. See *infra,* at 852. We therefore do not address his § 924(c) and § 5861(f) convictions.

Constitution, Art. I, § 8, cl. 3. Courts of Appeals have divided both on the question whether § 844(i) applies to buildings not used for commercial purposes,[2] and on the constitutionality of such an application.[3] We granted certiorari, 528 U. S. 1002 (1999), and framed as the question presented:

> "Whether, in light of *United States* v. *Lopez*, 514 U. S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988), 18 U. S. C. § 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional."

Satisfied that § 844(i) does not reach an owner-occupied residence that is not used for any commercial purpose, we reverse the Court of Appeals' judgment.

## II

Congress enacted 18 U. S. C. § 844(i) as part of Title XI of the Organized Crime Control Act of 1970, Pub. L. 91–452, § 1102, 84 Stat. 952, "because of the need 'to curb the use, transportation, and possession of explosives.'" *Russell* v.

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[2] Compare *United States* v. *Gaydos*, 108 F. 3d 505 (CA3 1997) (vacant, uninhabitable house formerly rented not covered by statute), *United States* v. *Denalli*, 73 F. 3d 328 (CA11) (owner-occupied residence not covered), modified on other grounds, 90 F. 3d 444 (1996) *(per curiam)*, *United States* v. *Mennuti*, 639 F. 2d 107 (CA2 1981) (same), with *United States* v. *Ryan*, 41 F. 3d 361 (CA8 1994) (en banc) (vacant former commercial property covered), cert. denied, 514 U. S. 1082 (1995), *United States* v. *Ramey*, 24 F. 3d 602 (CA4 1994) (owner-occupied residence covered), cert. denied, 514 U. S. 1103 (1995), and *United States* v. *Stillwell*, 900 F. 2d 1104 (CA7) (same), cert. denied, 498 U. S. 838 (1990).

[3] Compare *United States* v. *Pappadopoulos*, 64 F. 3d 522 (CA9 1995) (application to owner-occupied residence unconstitutional), with 178 F. 3d 479 (CA7 1999) (decision below), and *Ramey*, 24 F. 3d, at 602 (application constitutional).

*United States*, 471 U. S. 858, 860, n. 5 (1985) (citation omitted). The word "fire," which did not appear in § 844(i) as originally composed, was introduced by statutory amendment in 1982.[4] As now worded, § 844(i) (1994 ed., Supp. IV) reads in relevant part:

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both . . . ."

We previously construed § 844(i) in *Russell* v. *United States*, 471 U. S. 858 (1985), and there held that § 844(i) applies to a building "used as rental property," *ibid.* The petitioner-defendant in *Russell* had unsuccessfully attempted to set fire to a two-unit apartment building he owned. He earned rental income from the property and "treated it as business property for tax purposes." *Id.*, at 859. Our decision stated as the dispositive fact: "Petitioner was renting his apartment building to tenants at the time he attempted to destroy it by fire." *Id.*, at 862. It followed from that fact, the *Russell* opinion concluded, that "[t]he property was . . . being used in an activity affecting commerce within the meaning of § 844(i)." *Ibid.*[5]

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[4] See Pub. L. 97–298, § 2(c), 96 Stat. 1319 (amending § 844(i) to insert the words "fire or" before the words "an explosive"). The House Report accompanying the 1982 legislation explained that the original measure, which was confined to damage caused by "an explosive," had resulted in problems of practical application. H. R. Rep. No. 678, 97th Cong., 2d Sess., 2 (1982). In particular, the Report noted a Circuit conflict on the question whether the measure covered use of gasoline or other flammable liquids to ignite a fire. *Id.*, at 2, and nn. 5–6.

[5] We noted in *Russell* that the original version of the bill that became § 844(i) applied to destruction, by means of explosives, of property used "'for business purposes.'" 471 U. S., at 860, n. 5. After some House

We now confront a question that was not before the Court in *Russell:* Does § 844(i) cover property occupied and used by its owner not for any commercial venture, but as a private residence. Is such a dwelling place, in the words of § 844(i), "used in . . . any activity affecting . . . commerce"?

In support of its argument that § 844(i) reaches the arson of an owner-occupied private residence, the Government relies principally on the breadth of the statutory term "affecting . . . commerce," see Brief for United States 10, 16–17, words that, when unqualified, signal Congress' intent to invoke its full authority under the Commerce Clause. But § 844(i) contains the qualifying words "used in" a commerce-affecting activity. The key word is "used." "Congress did not define the crime described in § 844(i) as the explosion of a building whose damage or destruction might affect interstate commerce . . . ." *United States* v. *Mennuti,* 639 F. 2d 107, 110 (CA2 1981) (Friendly, J.).[6] Congress "require[d] that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce." *Ibid.* The proper inquiry, we agree, "is into the function of the building itself, and then a determination of whether that function affects interstate commerce."

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members indicated that they thought the provision should apply to the bombings of schools, police stations, and places of worship, the words "for business purposes" were omitted. *Id.,* at 860–861. The House Report accompanying the final bill, we further noted in *Russell,* described § 844(i) as " 'a very broad provision covering substantially all business property.' " *Id.,* at 861, and n. 8 (citing H. R. Rep. No. 91–1549, pp. 69–70 (1970)).

[6] The defendants in *Mennuti* destroyed two buildings. One was the residence of the owner and her family, the other was a rental property. See 639 F. 2d, at 108–109, n. 1. The Second Circuit affirmed the District Court's dismissal of the entire indictment. Our decision in *Russell* v. *United States,* 471 U. S. 858 (1985), supersedes *Mennuti* with respect to the building held for rental. Regarding the family residence, we find *Mennuti's* reasoning persuasive.

*United States* v. *Ryan*, 9 F. 3d 660, 675 (CA8 1993) (Arnold, C. J., concurring in part and dissenting in part).[7]

The Government urges that the Fort Wayne, Indiana, residence into which Jones tossed a Molotov cocktail was constantly "used" in at least three "activit[ies] affecting commerce." First, the homeowner "used" the dwelling as collateral to obtain and secure a mortgage from an Oklahoma lender; the lender, in turn, "used" the property as security for the home loan. Second, the homeowner "used" the residence to obtain a casualty insurance policy from a Wisconsin insurer. That policy, the Government points out, safeguarded the interests of the homeowner and the mortgagee. Third, the homeowner "used" the dwelling to receive natural gas from sources outside Indiana. See Brief for United States 19–23.

The Government correctly observes that § 844(i) excludes no particular type of building (it covers "any building"); the provision does, however, require that the building be "used" in an activity affecting commerce. That qualification is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce. Although "variously defined," the word "use," in legislation as in conversation, ordinarily signifies "active employment." *Bailey* v. *United States*, 516 U. S. 137, 143, 145 (1995); see also *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

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[7] In *Ryan*, Chief Judge Arnold dissented from a panel decision holding that the arson of a permanently closed fitness center fell within § 844(i)'s prohibition. The panel majority considered adequate either of two interstate commerce connections: the building was owned and leased by out-of-state parties, and received natural gas from across state borders. The panel added, however, that it would not extend the decision "to property which is purely private in nature, such as a privately owned home, used solely for residential purposes." 9 F. 3d, at 666–667. Sitting en banc, the Eighth Circuit affirmed the panel's judgment. See *United States* v. *Ryan*, 41 F. 3d 361 (1994), cert. denied, 514 U. S. 1082 (1995).

It surely is not the common perception that a private, owner-occupied residence is "used" in the "activity" of receiving natural gas, a mortgage, or an insurance policy. Cf. *Bailey,* 516 U. S., at 145 (interpreting the word "use," as it appears in 18 U. S. C. § 924(c)(1), to mean active employment of a firearm and rejecting the Government's argument that a gun is "used" whenever its presence "protect[s] drugs" or "embolden[s]" a drug dealer). The Government does not allege that the Indiana residence involved in this case served as a home office or the locus of any commercial undertaking. The home's only "active employment," so far as the record reveals, was for the everyday living of Jones's cousin and his family.

Our decision in *Russell* does not warrant a less "use"-centered reading of § 844(i). In that case, which involved the arson of property rented out by its owner, see *supra,* at 853, the Court referred to the recognized distinction between legislation limited to activities "in commerce" and legislation invoking Congress' full power over activity substantially "affecting . . . commerce." 471 U. S., at 859–860, and n. 4. The *Russell* opinion went on to observe, however, that "[b]y its terms," § 844(i) applies only to "property that is 'used' in an 'activity' that affects commerce." *Id.,* at 862. "The rental of real estate," the Court then stated, "is unquestionably such an activity." *Ibid.*[8] Here, as earlier emphasized, the owner used the property as his home, the center of his family life. He did not use the residence in any trade or business.

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[8] Notably, the Court in *Russell* did not rest its holding on the expansive interpretation advanced by the Government both in *Russell* and in this case. Compare Brief for United States in *Russell* v. *United States,* O. T. 1984, No. 435, p. 15 ("Petitioner used his building on South Union Street in an activity affecting interstate commerce by heating it with gas that moved interstate."), with *Russell,* 471 U. S., at 862 (focusing instead on fact that "[t]he rental of real estate is unquestionably . . . an activity" affecting commerce).

Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. See, *e. g., FERC* v. *Mississippi*, 456 U. S. 742, 757 (1982) (observing that electric energy is consumed "in virtually every home" and that "[n]o State relies solely on its own resources" to meet its inhabitants' demand for the product). If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office. See *United States* v. *Monholland*, 607 F. 2d 1311, 1316 (CA10 1979) (finding in § 844(i) no indication that Congress intended to include "everybody and everything"). "Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf* v. *United States*, 510 U. S. 135, 140–141 (1994); accord, *Bailey*, 516 U. S., at 145.

## III

Our reading of § 844(i) is in harmony with the guiding principle that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909), quoted in *Jones* v. *United States*, 526 U. S. 227, 239 (1999); see also *DeBartolo*, 485 U. S., at 575; *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). In *Lopez*, this Court invalidated the Gun-Free School Zones Act, former 18 U. S. C. § 922(q) (1988 ed., Supp. V), which made it a federal crime to possess a firearm within

1,000 feet of a school. The defendant in that case, a 12th-grade student, had been convicted for knowingly possessing a concealed handgun and bullets at his San Antonio, Texas, high school, in violation of the federal Act. Holding that the Act exceeded Congress' power to regulate commerce, the Court stressed that the area was one of traditional state concern, see 514 U. S., at 561, n. 3, 567; *id.*, at 577 (KENNEDY, J., concurring), and that the legislation aimed at activity in which "neither the actors nor their conduct has a commercial character," *id.*, at 580 (KENNEDY, J., concurring); *id.*, at 560–562 (opinion of the Court).

Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement." *United States* v. *Bass*, 404 U. S. 336, 350 (1971). Our comprehension of § 844(i) is additionally reinforced by other interpretive guides. We have instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), and that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite," *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952). We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes. *Bass*, 404 U. S., at 349. To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. See generally Poulos, The Metamorphosis of the Law of Arson, 51 Mo. L. Rev. 295 (1986).

## IV

We conclude that § 844(i) is not soundly read to make virtually every arson in the country a federal offense. We hold that the provision covers only property currently used in commerce or in an activity affecting commerce. The home owned and occupied by petitioner Jones's cousin was not so used—it was a dwelling place used for everyday family living. As we read § 844(i), Congress left cases of this genre to the law enforcement authorities of the States.

Our holding that § 844(i) does not cover the arson of an owner-occupied dwelling means that Jones's § 844(i) conviction must be vacated. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE THOMAS joins, concurring.

Part II of the Court's opinion convincingly explains why its construction of 18 U. S. C. § 844(i) better fits the text and context of the provision than the Government's expansive reading. It also seems appropriate, however, to emphasize the kinship between our well-established presumption against federal pre-emption of state law, see *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978), and our reluctance to "believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this." *United States* v. *Altobella*, 442 F. 2d 310, 316 (CA7 1971). The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years, Ind. Code §§ 35–43–1–1, 35–50–2–5 (1993), illustrates how a criminal law like this may effectively displace a policy choice made by the State. Even when Congress has undoubted power to pre-empt local law, we have wisely decided that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U. S. 336, 349 (1971). For this reason, I reiterate my firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain.*

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

In joining the Court's opinion, I express no view on the question whether the federal arson statute, 18 U. S. C. § 844(i) (1994 ed., Supp. IV), as there construed, is constitutional in its application to all buildings used for commercial activities.

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*See *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681, 700, n. 2 (1985) (STEVENS, J., dissenting); *Bennett* v. *New Jersey*, 470 U. S. 632, 654–655, n. 16 (1985) (STEVENS, J., dissenting); *Garcia* v. *United States*, 469 U. S. 70, 89–90 (1984) (STEVENS, J., dissenting); *Bell* v. *United States*, 462 U. S. 356, 363 (1983) (STEVENS, J., dissenting); *McElroy* v. *United States*, 455 U. S. 642, 675 (1982) (STEVENS, J., dissenting).

# GEIER ET AL. *v.* AMERICAN HONDA MOTOR CO., INC., ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98–1811. Argued December 7, 1999—Decided May 22, 2000

Pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966, the Department of Transportation (DOT) promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208, which required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. Petitioner Alexis Geier was injured in an accident while driving a 1987 Honda Accord that did not have such restraints. She and her parents, also petitioners, sought damages under District of Columbia tort law, claiming, *inter alia,* that respondents (hereinafter American Honda) were negligent in not equipping the Accord with a driver's side airbag. Ruling that their claims were expressly pre-empted by the Act, the District Court granted American Honda summary judgment. In affirming, the Court of Appeals concluded that, because petitioners' state tort claims posed an obstacle to the accomplishment of the objectives of FMVSS 208, those claims conflicted with that standard and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit.

*Held:* Petitioners' "no airbag" lawsuit conflicts with the objectives of FMVSS 208 and is therefore pre-empted by the Act. Pp. 867–886.

(a) The Act's pre-emption provision, 15 U. S. C. § 1392(d), does not expressly pre-empt this lawsuit. The presence of a saving clause, which says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law," § 1397(k), requires that the pre-emption provision be read narrowly to pre-empt only state statutes and regulations. The saving clause assumes that there are a significant number of common-law liability cases to save. And reading the express pre-emption provision to exclude common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate where, for example, federal law creates only a minimum safety standard. Pp. 867–868.

(b) However, the saving clause does *not* bar the ordinary working of conflict pre-emption principles. Nothing in that clause suggests an intent to save state tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt" sound as if they simply bar a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute, or a minimum, requirement. This interpretation does not conflict with the purpose of the saving provision, for it preserves actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. Moreover, this Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law, a concern applicable here. The pre-emption provision and the saving provision, read together, reflect a neutral policy, not a specially favorable or unfavorable one, toward the application of ordinary conflict pre-emption. The pre-emption provision itself favors pre-emption of state tort suits, while the saving clause disfavors pre-emption at least some of the time. However, there is nothing in any natural reading of the two provisions that would favor one policy over the other where a jury-imposed safety standard actually conflicts with a federal safety standard. Pp. 869–874.

(c) This lawsuit actually conflicts with FMVSS 208 and the Act itself. DOT saw FMVSS 208 not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems that would be gradually introduced, thereby lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance—all of which would promote FMVSS 208's safety objectives. The standard's history helps explain why and how DOT sought these objectives. DOT began instituting passive restraint requirements in 1970, but it always permitted passive restraint options. Public resistance to an ignition interlock device that in effect forced occupants to buckle up their manual belts influenced DOT's subsequent initiatives. The 1984 version of FMVSS 208 reflected several significant considerations regarding the effectiveness of manual seatbelts and the likelihood that passengers would leave their manual seatbelts unbuckled, the advantages and disadvantages of passive restraints, and the public's resistance to the installation or use of then-available passive restraint devices. Most importantly, it deliberately sought variety, rejecting an "all airbag" standard because perceived or real safety concerns threatened a backlash more easily overcome with a mix of several different devices. A mix would also help develop data on comparative effectiveness, allow the industry time to overcome safety problems and high production costs associated with airbags, and facilitate the development of alternative, cheaper, and safer passive restraint systems, thereby building public confidence necessary to avoid an interlock-type fiasco. The 1984 standard also deliberately sought to gradually phase in passive restraints, starting with a 10% requirement in 1987 vehicles. The requirement was also conditional and would stay in effect only if two-thirds of the States did not adopt mandatory buckle-up laws. A rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed. It would also have made adoption of state mandatory seatbelt laws less likely. This Court's pre-emption cases assume compliance with the state law duty in question, and do not turn on such compliance-related considerations as whether a private party would ignore state legal obligations or how likely it is that state law actually would be enforced. Finally, some weight is placed upon DOT's interpretation of FMVSS 208's objectives and its conclusion that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives. DOT is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements. Because there is no reason to suspect that the Solicitor General's representation of these views reflects anything other than the agency's fair and considered judgment on the matter, DOT's failure in promulgating FMVSS 208 to address pre-emption explicitly is not determinative. Nor do the agency's views, as presented here, lack coherence. Pp. 874–886.

166 F. 3d 1236, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, THOMAS, and GINSBURG, JJ., joined, *post*, p. 886.

*Arthur H. Bryant* argued the cause for petitioners. With him on the briefs were *Leslie A. Brueckner* and *Robert M. N. Palmer.*

*Malcolm E. Wheeler* argued the cause for respondents. With him on the brief were *Benjamin S. Boyd, Mark A. Brooks,* and *Brad J. Safon.*

*Deputy Solicitor General Wallace* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Waxman, Acting Assistant Attorney General Ogden, Matthew D. Roberts,* *Douglas N. Letter, Kathleen Moriarty Mueller, Nancy E. McFadden, Paul M. Geier,* and *Frank Seales, Jr.**

JUSTICE BREYER delivered the opinion of the Court.

This case focuses on the 1984 version of a Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U. S. C. § 1381 *et seq.* (1988 ed.). The standard, FMVSS 208, required auto manufacturers to equip some but not all of their

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*Briefs of *amici curiae* urging reversal were filed for the State of Missouri et al. by *Jeremiah W. (Jay) Nixon,* Attorney General of Missouri, *James R. Layton,* State Solicitor, *Charles Hatfield,* and *Barbara McDonnell,* Chief Deputy Attorney General of Colorado, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *M. Jane Brady* of Delaware, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Joseph P. Mazurek* of Montana, *Philip T. McLaughlin* of New Hampshire, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the Association of Trial Lawyers of America by *Jeffrey Robert White;* for the Attorneys Information Exchange Group by *Larry E. Coben;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley;* and for Robert B Leflar et al. by *Mr. Leflar, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Theodore B. Olson, Theodore J. Boutrous, Jr., Thomas G. Hungar,* and *Robin S. Conrad;* for the Alliance of Automobile Manufacturers et al. by *Thomas W. Merrill, Gene C. Schaerr, Brett M. Kavanaugh,* and *Richard A. Cordray;* for the Blue Cross Blue Shield Association by *Anthony F. Shelley* and *Alan I. Horowitz;* for the Defense Research Institute by *Kevin M. Reynolds, Robert L. Fanter, Richard J. Kirschman, Lloyd H. Milliken, Jr., Randall R. Riggs,* and *T. Joseph Wendt;* for General Motors Corp. by *David M. Heilbron* and *Leslie G. Landau;* for the Product Liability Advisory Council, Inc., by *Kenneth S. Geller, Erika Z. Jones,* and *John J. Sullivan;* and for the Washington Legal Foundation by *Lawrence S. Ebner, Daniel J. Popeo,* and *Richard A. Samp.*

*David Overlock Stewart* and *Thomas M. Susman* filed a brief for the Business Roundtable as *amicus curiae.*

1987 vehicles with passive restraints. We ask whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless have equipped a 1987 automobile with airbags. We conclude that the Act, taken together with FMVSS 208, pre-empts the lawsuit.

## I

In 1992, petitioner Alexis Geier, driving a 1987 Honda Accord, collided with a tree and was seriously injured. The car was equipped with manual shoulder and lap belts which Geier had buckled up at the time. The car was not equipped with airbags or other passive restraint devices.

Geier and her parents, also petitioners, sued the car's manufacturer, American Honda Motor Company, Inc., and its affiliates (hereinafter American Honda), under District of Columbia tort law. They claimed, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver's side airbag. App. 3. The District Court dismissed the lawsuit. The court noted that FMVSS 208 gave car manufacturers a choice as to whether to install airbags. And the court concluded that petitioners' lawsuit, because it sought to establish a different safety standard—*i. e.*, an airbag requirement—was expressly pre-empted by a provision of the Act which pre-empts "any safety standard" that is not identical to a federal safety standard applicable to the same aspect of performance, 15 U. S. C. § 1392(d) (1988 ed.); Civ. No. 95–CV–0064 (D. D. C., Dec. 9, 1997), App. 17. (We, like the courts below and the parties, refer to the pre-1994 version of the statute throughout the opinion; it has been recodified at 49 U. S. C. § 30101 *et seq.*)

The Court of Appeals agreed with the District Court's conclusion but on somewhat different reasoning. It had doubts, given the existence of the Act's "saving" clause, 15 U. S. C. § 1397(k) (1988 ed.), that petitioners' lawsuit involved the potential creation of the kind of "safety standard" to which the Safety Act's express pre-emption provision refers. But it declined to resolve that question because it found that petitioners' state-law tort claims posed an obstacle to the accomplishment of FMVSS 208's objectives. For that reason, it found that those claims conflicted with FMVSS 208, and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit. The Court of Appeals thus affirmed the District Court's dismissal. 166 F. 3d 1236, 1238–1243 (CADC 1999).

Several state courts have held to the contrary, namely, that neither the Act's express pre-emption nor FMVSS 208 pre-empts a "no airbag" tort suit. See, *e. g., Drattel* v. *Toyota Motor Corp.*, 92 N. Y. 2d 35, 43–53, 699 N. E. 2d 376, 379–386 (1998); *Minton* v. *Honda of America Mfg., Inc.*, 80 Ohio St. 3d 62, 70–79, 684 N. E. 2d 648, 655–661 (1997); *Munroe* v. *Galati*, 189 Ariz. 113, 115–119, 938 P. 2d 1114, 1116–1120 (1997); *Wilson* v. *Pleasant*, 660 N. E. 2d 327, 330–339 (Ind. 1995); *Tebbetts* v. *Ford Motor Co.*, 140 N. H. 203, 206–207, 665 A. 2d 345, 347–348 (1995). All of the Federal Circuit Courts that have considered the question, however, have found pre-emption. One rested its conclusion on the Act's express pre-emption provision. See, *e. g., Harris* v. *Ford Motor Co.*, 110 F. 3d 1410, 1413–1415 (CA9 1997). Others, such as the Court of Appeals below, have instead found pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to FMVSS 208's objectives, and thus to the Act itself. See, *e. g., Montag* v. *Honda Motor Co.*, 75 F. 3d 1414, 1417 (CA10 1996); *Pokorny* v. *Ford Motor Co.*, 902 F. 2d 1116, 1121–1125 (CA3 1990); *Taylor* v. *General Motors Corp.*, 875 F. 2d 816, 825–827 (CA11 1989); *Wood* v. *General Motors Corp.*, 865 F. 2d 395, 412–414 (CA1 1988). We granted certiorari to resolve these differences. We now hold that this kind of "no airbag" lawsuit conflicts with the objectives of FMVSS 208, a standard authorized by the Act, and is therefore pre-empted by the Act.

In reaching our conclusion, we consider three subsidiary questions. First, does the Act's express pre-emption provision pre-empt this lawsuit? We think not. Second, do ordinary pre-emption principles nonetheless apply? We hold that they do. Third, does this lawsuit actually conflict with FMVSS 208, hence with the Act itself? We hold that it does.

## II

We first ask whether the Safety Act's express pre-emption provision pre-empts this tort action. The provision reads as follows:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U. S. C. § 1392(d) (1988 ed.).

American Honda points out that a majority of this Court has said that a somewhat similar statutory provision in a different federal statute—a provision that uses the word "requirements"—may well expressly pre-empt similar tort actions. See, *e. g.*, *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 502–504 (1996) (plurality opinion); *id.*, at 503–505 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509–512 (O'CONNOR, J., concurring in part and dissenting in part). Petitioners reply that this statute speaks of pre-empting a state-law "safety *standard*," not a "requirement," and that a tort action does not involve a safety *standard*. Hence, they conclude, the express pre-emption provision does not apply.

We need not determine the precise significance of the use of the word "standard," rather than "requirement," however, for the Act contains another provision, which resolves the disagreement. That provision, a "saving" clause, says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law." 15 U. S. C. § 1397(k) (1988 ed.). The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate—for example, where federal law creates only a floor, *i. e.*, a minimum safety standard. See, *e. g.*, Brief for United States as *Amicus Curiae* 21 (explaining that common-law claim that a vehicle is defectively designed because it lacks antilock brakes would not be pre-empted by 49 CFR § 571.105 (1999), a safety standard establishing minimum requirements for brake performance). Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.

## III

We have just said that the saving clause *at least* removes tort actions from the scope of the express pre-emption clause. Does it do more? In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder? *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U. S. 141, 153 (1982). Petitioners concede, as they must in light of *Freightliner Corp.* v. *Myrick,* 514 U. S. 280 (1995), that the pre-emption provision, by itself, does not foreclose (through negative implication) "any possibility of implied [conflict] pre-emption," *id.,* at 288 (discussing *Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 517–518 (1992)). But they argue that the saving clause has that very effect.

We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. See *Freightliner, supra,* at 287, n. 3 (declining to address whether the saving clause prevents a manufacturer from "us[ing] a federal safety standard to immunize itself from state common-law liability"). We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt," 15 U. S. C. § 1397(k) (1988 ed.), sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. See Restatement (Third) of Torts: Products

Liability §4(b), Comment *e* (1997) (distinguishing between state-law compliance defense and a federal claim of pre-emption). It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. Nor does our interpretation conflict with the purpose of the saving provision, say, by rendering it ineffectual. As we have previously explained, the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. See *supra*, at 867–868.

Moreover, this Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, *ante*, at 106–107; see *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U. S. 214, 227–228 (1998) *(AT&T); Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446 (1907). We find this concern applicable in the present case. And we conclude that the saving clause foresees—it does not foreclose—the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts. We do not understand the dissent to disagree, for it acknowledges that ordinary pre-emption principles apply, at least sometimes. *Post*, at 899–900 (opinion of STEVENS, J.).

Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles—which "special burden" would specially disfavor pre-emption here. Cf. *post*, at 898–899. The two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. See H. R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966) ("Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards"); S. Rep. No. 1301, 89th Cong., 2d Sess., 12 (1966). This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.

Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires. See, *e. g.*, 49 CFR § 571.212 (1999). Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to " 'destroy itself.' " *AT&T, supra,* at 228 (quoting *Abilene Cotton, supra,* at 446). We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. Cf. *post,* at 900, n. 16. But there is no reason to believe Congress has done so here.

The dissent, as we have said, contends nonetheless that the express pre-emption and saving provisions here, taken together, create a "special burden," which a court must impose "on a party" who claims conflict pre-emption under those principles. *Post,* at 898. But nothing in the Safety Act's language refers to any "special burden." Nor can one find the basis for a "special burden" in this Court's precedents. It is true that, in *Freightliner Corp.* v. *Myrick,* 514 U. S. 280 (1995), the Court said, in the context of interpreting the Safety Act, that "*[a]t best*" there is an "inference that an express pre-emption clause forecloses implied pre-emption." *Id.*, at 289 (emphasis added). But the Court made this statement in the course of *rejecting* the more absolute argument that the presence of the express pre-emption provision entirely foreclosed the possibility of conflict pre-emption. *Id.*, at 288. The statement, headed with the qualifier "[a]t best," and made in a case where, without any need for inferences or "special burdens," state law obviously would survive, see *id.*, at 289–290, simply preserves a legal possibility. This

Court did not hold that the Safety Act *does* create a "special burden," or still less that such a burden necessarily arises from the limits of an express pre-emption provision. And considerations of language, purpose, and administrative workability, together with the principles underlying this Court's pre-emption doctrine discussed above, make clear that the express pre-emption provision imposes no unusual, "special burden" against pre-emption. For similar reasons, we do not see the basis for interpreting the saving clause to impose any such burden.

A "special burden" would also promise practical difficulty by further complicating well-established pre-emption principles that already are difficult to apply. The dissent does not contend that this "special burden" would apply in a case in which state law penalizes what federal law requires—*i. e.*, a case of impossibility. See *post*, at 892–893, n. 6, 900, n. 16. But if it would not apply in such a case, then how, or when, would it apply? This Court, when describing conflict preemption, has spoken of pre-empting state law that "under the circumstances of th[e] particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"—whether that "obstacle" goes by the name of "conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference," or the like. *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941); see *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 526 (1977). The Court has not previously driven a legal wedge—only a terminological one—between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause, *De la Cuesta*, 458 U. S., at 152–153; see *Locke*, *ante*, at 109; *English* v. *General Elec. Co.*, 496 U. S. 72, 78–79 (1990), and it has assumed that Congress would not want either kind of conflict. The Court has thus refused to read general "saving" provisions to tolerate actual conflict *both* in cases involving impossibility, see, *e. g., AT&T,* 524 U. S., at 228, *and* in "frustration-of-purpose" cases, see, *e. g., Locke, ante,* at 103–112; *International Paper Co.* v. *Ouellette,* 479 U. S. 481, 493–494 (1987); see also *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U. S. 311, 328–331 (1981). We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable systemwide costs (*e. g.,* conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of "conflict" (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain some form of an express pre-emption provision, a saving provision, or as here, both. Nothing in the statute suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption with an added "special burden." Indeed, the dissent's willingness to impose a "special burden" here stems ultimately from its view that "frustration-of-purpos[e]" conflict pre-emption is a freewheeling, "inadequately considered" doctrine that might well be "eliminate[d]." *Post,* at 907–908, and n. 22. In a word, ordinary pre-emption principles, grounded in longstanding precedent, *Hines, supra,* at 67, apply. We would not further complicate the law with complex new doctrine.

## IV

The basic question, then, is whether a common-law "no airbag" action like the one before us actually conflicts with FMVSS 208. We hold that it does.

In petitioners' and the dissent's view, FMVSS 208 sets a minimum airbag standard. As far as FMVSS 208 is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view. The Department of

Transportation's (DOT's) comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance—all of which would promote FMVSS 208's safety objectives. See generally 49 Fed. Reg. 28962 (1984).

### A

The history of FMVSS 208 helps explain why and how DOT sought these objectives. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 34–38 (1983). In 1967, DOT, understanding that seatbelts would save many lives, required manufacturers to install manual seatbelts in all automobiles. 32 Fed. Reg. 2408, 2415. It became apparent, however, that most occupants simply would not buckle up their belts. See 34 Fed. Reg. 11148 (1969). DOT then began to investigate the feasibility of requiring "passive restraints," such as airbags and automatic seatbelts. *Ibid.* In 1970, it amended FMVSS 208 to include some passive protection requirements, 35 Fed. Reg. 16927, while making clear that airbags were one of several "equally acceptable" devices and that it neither " 'favored' [n]or expected the introduction of airbag systems." *Ibid.* In 1971, it added an express provision permitting compliance through the use of nondetachable passive belts, 36 Fed. Reg. 12858, 12859, and in 1972, it mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975, 37 Fed. Reg. 3911. Although the agency's focus was originally on airbags, 34 Fed. Reg. 11148 (1969) (notice of proposed rulemaking); *State Farm*, 463 U. S., at 35, n. 4; see also *id.*, at 46, n. 11 (noting view of commentators that, as of 1970, FMVSS

208 was "'a de facto airbag mandate'" because of the state of passive restraint technology), at no point did FMVSS 208 formally require the use of airbags. From the start, as in 1984, it permitted passive restraint options.

DOT gave manufacturers a further choice for new vehicles manufactured between 1972 and August 1975. Manufacturers could either install a passive restraint device such as automatic seatbelts or airbags or retain manual belts and add an "ignition interlock" device that in effect forced occupants to buckle up by preventing the ignition otherwise from turning on. 37 Fed. Reg. 3911 (1972). The interlock soon became popular with manufacturers. And in 1974, when the agency approved the use of detachable automatic seatbelts, it conditioned that approval by providing that such systems must include an interlock system *and* a continuous warning buzzer to encourage reattachment of the belt. 39 Fed. Reg. 14593. But the interlock and buzzer devices were most unpopular with the public. And Congress, responding to public pressure, passed a law that forbade DOT from requiring, or permitting compliance by means of, such devices. Motor Vehicle and Schoolbus Safety Amendments of 1974, § 109, 88 Stat. 1482 (previously codified at 15 U. S. C. § 1410b(b) (1988 ed.)).

That experience influenced DOT's subsequent passive restraint initiatives. In 1976, DOT Secretary William T. Coleman, Jr., fearing continued public resistance, suspended the passive restraint requirements. He sought to win public acceptance for a variety of passive restraint devices through a demonstration project that would involve about half a million new automobiles. *State Farm, supra,* at 37. But his successor, Brock Adams, canceled the project, instead amending FMVSS 208 to require passive restraints, principally either airbags or passive seatbelts. 42 Fed. Reg. 34289 (1977).

Andrew Lewis, a new DOT Secretary in a new administration, rescinded the Adams requirements, primarily because DOT learned that the industry planned to satisfy those requirements almost exclusively through the installation of detachable automatic seatbelts. 46 Fed. Reg. 53419–53420 (1981). This Court held the rescission unlawful. *State Farm, supra,* at 34, 46. And the stage was set for then-DOT Secretary, Elizabeth Dole, to amend FMVSS 208 once again, promulgating the version that is now before us. 49 Fed. Reg. 28962 (1984).

### B

Read in light of this history, DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations. First, buckled up seatbelts are a vital ingredient of automobile safety. *Id.,* at 29003; *State Farm, supra,* at 52 ("We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries"). Second, despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled. 49 Fed. Reg. 28983 (1984) (estimating that only 12.5% of front seat passengers buckled up manual belts). Third, airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely. *Id.,* at 28986 (concluding that, although an airbag plus a lap and shoulder belt was the most "effective" system, airbags alone were *less* effective than buckled up manual lap and shoulder belts).

Fourth, passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts. *Id.,* at 28992–28993. Fifth, airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars. *Id.,* at 28992, 29001; see also 65 Fed. Reg. 30680, 30681–30682 (2000) (finding 158 confirmed airbag-induced fatalities as of April 2000, and amending rule to add new requirements, test procedures, and injury criteria to ensure that "future air bags be designed to create less risk of serious airbag-induced injuries than current air bags, particularly for small women and young children"); U. S. Dept. of Transportation, National Highway Traffic Safety Administration, National Accident Sampling System Crashworthiness Data System 1991–1993, p. viii (Aug. 1995) (finding that airbags caused approximately 54,000 injuries between 1991 and 1993).

Sixth, airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low). 49 Fed. Reg. 28990 (1984). And the agency worried that the high replacement cost—estimated to be $800—could lead car owners to refuse to replace them after deployment. *Id.*, at 28990, 29000–29001; see also *id.*, at 28990 (estimating total investment costs for mandatory airbag requirement at $1.3 billion compared to $500 million for automatic seatbelts). Seventh, the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices, *id.*, at 28987–28989—a particular concern with respect to airbags, *id.*, at 29001 (noting that "[a]irbags engendered the largest quantity of, and most vociferously worded, comments").

FMVSS 208 reflected these considerations in several ways. Most importantly, that standard deliberately sought variety—a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. *Id.*, at 28996. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. *Id.*, at

28997. DOT wrote that it had *rejected* a proposed FMVSS 208 "all airbag" standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a "backlash" more easily overcome "if airbags" were "not the only way of complying." *Id.*, at 29001. It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. *Id.*, at 29001–29002. And it would thereby build public confidence, *id.*, at 29001–29002, necessary to avoid another interlock-type fiasco.

The 1984 FMVSS 208 standard also deliberately sought a *gradual* phase-in of passive restraints. *Id.*, at 28999–29000. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. *Id.*, at 28999. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. *Ibid.* And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance. *Id.*, at 29000–29001.

Of course, as the dissent points out, *post*, at 903, FMVSS 208 did not guarantee the mix by setting a ceiling for each different passive restraint device. In fact, it provided a form of extra credit for airbag installation (and other nonbelt passive restraint devices) under which each airbag-installed vehicle counted as 1.5 vehicles for purposes of meeting FMVSS 208's passive restraint requirement. 49 CFR § 571.208, S4.1.3.4(a)(1) (1999); 49 Fed. Reg. 29000 (1984).

But why should DOT have bothered to impose an airbag ceiling when the practical threat to the mix it desired arose from the likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all? After all, only a few years earlier, Secretary Dole's predecessor had discovered that manufacturers intended to meet the then-current passive restraint requirement almost entirely (more than 99%) through the installation of more affordable automatic belt systems. 46 Fed. Reg. 53421 (1981); *State Farm,* 463 U. S., at 38. The extra credit, as DOT explained, was designed to "encourage manufacturers to equip *at least some* of their cars with airbags." 49 Fed. Reg. 29001 (1984) (emphasis added) (responding to comment that failure to mandate airbags might mean the "end of . . . airbag technology"); see also *id.,* at 29000 (explaining that the extra credit for airbags "should promote the development of what may be better alternatives to automatic belts *than would otherwise be developed*" (emphasis added)). The credit provision *reinforces* the point that FMVSS 208 sought a gradually developing mix of passive restraint devices; it does not show the contrary.

Finally, FMVSS 208's passive restraint requirement was conditional. DOT believed that ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints, and at significantly lower costs—*if only auto occupants would buckle up.* See *id.,* at 28997–28998. Thus, FMVSS 208 provided for rescission of its passive restraint requirement if, by September 1, 1989, two-thirds of the States had laws in place that, like those of many other nations, required auto occupants to buckle up (and which met other requirements specified in the standard). *Id.,* at 28963, 28993–28994, 28997–28999. The Secretary wrote that "coverage of a large percentage of the American people by seatbelt laws that are enforced would largely negate the incremental increase in safety to be expected from an automatic protection requirement." *Id.,* at 28997.

In the end, two-thirds of the States did not enact mandatory buckle-up laws, and the passive restraint requirement remained in effect.

In sum, as DOT now tells us through the Solicitor General, the 1984 version of FMVSS 208 "embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." Brief for United States as *Amicus Curiae* 25; see 49 Fed. Reg. 28997 (1984). Petitioners' tort suit claims that the manufacturers of the 1987 Honda Accord "had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags." App. 3 (Complaint, ¶ 11).

In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law—*i. e.*, a rule of state tort law imposing such a duty—by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of-Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law. Because the rule of law for which petitioners contend would have stood "as an obstacle to the accomplishment and execution of" the important means-related federal objectives that we have just discussed, it is pre-empted. *Hines*, 312 U. S., at

67; see also *Ouellette,* 479 U. S., at 493; *De la Cuesta,* 458 U. S., at 156 (finding conflict and pre-emption where state law limited the availability of an option that the federal agency considered essential to ensure its ultimate objectives).

Petitioners ask this Court to calculate the precise size of the "obstacle," with the aim of minimizing it, by considering the risk of tort liability and a successful tort action's incentive-related or timing-related compliance effects. See Brief for Petitioners 45–50. The dissent agrees. *Post,* at 900–905. But this Court's pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations—paying, say, a fine instead—or how likely it is that state law actually would be enforced. Rather, this Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question. The Court has on occasion suggested that tort law may be somewhat different, and that related considerations—for example, the ability to pay damages instead of modifying one's behavior—may be relevant for pre-emption purposes. See *Goodyear Atomic Corp.* v. *Miller,* 486 U. S. 174, 185 (1988); *Cipollone,* 505 U. S., at 536–539 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); see also *English,* 496 U. S., at 86; *Silkwood* v. *Kerr-McGee Corp.,* 464 U. S. 238, 256 (1984). In other cases, the Court has found tort law to conflict with federal law without engaging in that kind of an analysis. See, *e. g., Ouellette, supra,* at 494–497; *Kalo Brick,* 450 U. S., at 324–332. We need not try to resolve these differences here, however, for the incentive or compliance considerations upon which the dissent relies cannot, by themselves, change the legal result. Some of those considerations rest on speculation, see, *e. g., post,* at 901 (predicting risk of "no airbag" liability and manufacturers' likely response to such liability); some rest in critical part upon the dissenters' own view of FMVSS 208's basic purposes—a view which we reject, see, *e. g., post,* at 901–904 (suggesting that pre-existing risk of "no airbag" liability would have made FMVSS 208 unnecessary); and others, if we understand them correctly, seem less than persuasive, see, *e. g., post,* at 902 (suggesting that manufacturers could have complied with a mandatory state airbag duty by installing a *different* kind of passive restraint device). And in so concluding, we do not "put the burden" of proving pre-emption on petitioners. *Post,* at 907. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict.

One final point: We place some weight upon DOT's interpretation of FMVSS 208's objectives and its conclusion, as set forth in the Government's brief, that a tort suit such as this one would " 'stan[d] as an obstacle to the accomplishment and execution' " of those objectives. Brief for United States as *Amicus Curiae* 25–26 (quoting *Hines, supra,* at 67). Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. *Medtronic,* 518 U. S., at 496; see *id.,* at 506 (BREYER, J., concurring in part and concurring in judgment). And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time. Brief for United States as *Amicus Curiae* in *Freightliner Corp.* v. *Myrick,* O. T. 1994, No. 94–286, pp. 28–29; Brief for United States as *Amicus Curiae* in *Wood* v. *General Motors Corp.,* O. T. 1989, No. 89–46, pp. 7, 11–16. In these circumstances, the agency's own views should make a difference. See *City of New York* v. *FCC,* 486 U. S. 57, 64 (1988); *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U. S. 707, 714, 721 (1985); *De la Cuesta, supra,* at 158; *Blum* v. *Bacon,* 457 U. S. 132, 141 (1982); *Kalo Brick, supra,* at 321.

We have no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than "the agency's fair and considered judgment on the matter." *Auer* v. *Robbins*, 519 U. S. 452, 461–462 (1997); cf. *Hillsborough County, supra*, at 721 (expressing reluctance, in the absence of strong evidence, to find an actual conflict between state law and federal regulation where agency that promulgated the regulation had not, at the time the regulation was promulgated *or subsequently*, concluded that such a conflict existed). The failure of the Federal Register to address pre-emption explicitly is thus not determinative.

The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre-emption. See *post*, at 908–909; *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U. S. 572, 583 (1987); *Hillsborough, supra*, at 718. And conflict pre-emption is different in that it turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent. *English, supra*, at 78–79; see *Hillsborough, supra*, at 720–721; *Jones*, 430 U. S., at 540–543. While "[p]re-emption fundamentally is a question of congressional intent," *English, supra*, at 78, this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. See, *e. g., Freightliner*, 514 U. S., at 287; *English, supra*, at 78–79; see also *Cipollone, supra*, at 545, 547–548 (SCALIA, J., concurring in judgment in part and dissenting in part). And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area, *Hillsborough, supra*, at 717; see *post*, at 908–909, n. 23—so-called "field pre-emption"—the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists.

Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. While we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, *English*, *supra*, at 90, for the reasons set out above we find such evidence here. To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent, as we have said, apparently welcomes that result, at least where "frustration-of-purpos[e]" pre-emption by agency regulation is at issue. *Post*, at 907–908, and n. 22. We do not.

Nor do we agree with the dissent that the agency's views, as presented here, lack coherence. *Post*, at 904–905. The dissent points, *ibid.*, to language in the Government's brief stating that

> "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car *because of other design features particular to that car* . . . would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23 (emphasis added).

And the dissent says that these words amount to a concession that there is no conflict in this very case. *Post*, at 905. But that is not what the words say. Rather, as the italicized phrase emphasizes, they simply leave open the question whether FMVSS 208 would pre-empt a different kind of tort case—one *not* at issue here. It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption—say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective. But that is not what petitioners claimed. They have argued generally that, to be safe, a car must have an airbag. See App. 4.

Regardless, the language of FMVSS 208 and the contemporaneous 1984 DOT explanation is clear enough—even without giving DOT's own view special weight. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an "obstacle" to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG join, dissenting.

Airbag technology has been available to automobile manufacturers for over 30 years. There is now general agreement on the proposition "that, to be safe, a car must have an airbag." *Ante* this page. Indeed, current federal law imposes that requirement on all automobile manufacturers. See 49 U. S. C. §30127; 49 CFR §571.208, S4.1.5.3 (1998). The question raised by petitioners' common-law tort action is whether that proposition was sufficiently obvious when Honda's 1987 Accord was manufactured to make the failure to install such a safety feature actionable under theories of negligence or defective design. The Court holds that an interim regulation motivated by the Secretary of Transportation's desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. I respectfully dissent from that holding, and especially from the Court's unprecedented extension of the doctrine of pre-emption. As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate.

"This is a case about federalism," *Coleman* v. *Thompson*, 501 U. S. 722, 726 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden* v. *Maine*, 527 U. S. 706, 713 (1999). It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: It is the product of the Court's interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined. I believe, however, that it is fair to state that if it had been expressly adopted by the Secretary of Transportation, it would have read as follows:

> "No state court shall entertain a common-law tort action based on a claim that an automobile was negligently or defectively designed because it was not equipped with an airbag;
>
> "Provided, however, that this rule shall not apply to cars manufactured before September 1, 1986, or after such time as the Secretary may require the installation of airbags in all new cars; and
>
> "Provided further, that this rule shall not preclude a claim by a driver who was not wearing her seatbelt that an automobile was negligently or defectively designed because it was not equipped with any passive restraint whatsoever, or a claim that an automobile with particular design features was negligently or defectively designed because it was equipped with one type of passive restraint instead of another."

Perhaps such a rule would be a wise component of a legislative reform of our tort system. I express no opinion about that possibility. It is, however, quite clear to me that Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so. It is equally clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the lifesaving advantages of airbags had become sufficiently obvious that their omission might constitute a design defect in some new cars. Finally, I submit that the Court is quite wrong to characterize its rejection of the presumption against pre-emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as "ordinary experience-proved principles of conflict pre-emption." *Ante,* at 874.

## I

The question presented is whether either the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), 80 Stat. 718, 15 U. S. C. § 1381 *et seq.* (1988 ed.),[1] or the version of Standard 208 promulgated by the Secretary of Transportation in 1984, 49 CFR § 571.208, S4.1.3–S4.1.4 (1998), pre-empts common-law tort claims that an automobile manufactured in 1987 was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to, airbags." App. 3. In *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U. S. 29, 34–38 (1983), we reviewed the first chapters of the "complex and convoluted history" of Standard 208. It was the "unacceptably high" rate of deaths and injuries caused by automobile accidents that led to the enactment of the Safety Act in 1966. *Id.,* at 33. The purpose of the Act, as stated by Congress, was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U. S. C. § 1381. The Act directed the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." § 1392(a). The Act defines the term "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance." § 1391(2).

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[1] In 1994, the Safety Act was recodified at 49 U. S. C. § 30101 *et seq.* Because the changes made to the Act as part of the recodification process were not intended to be substantive, throughout this opinion I shall refer to the pre-1994 version of the statute, as did the Court of Appeals.

Standard 208 covers "[o]ccupant crash protection." Its purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements . . . [and] equipment requirements for active and passive restraint systems." 49 CFR § 571.208, S2 (1998). The first version of that standard, issued in 1967, simply required the installation of manual seatbelts in all automobiles. Two years later the Secretary formally proposed a revision that would require the installation of "passive occupant restraint systems," that is to say, devices that do not depend for their effectiveness on any action by the vehicle occupant. The airbag is one such system.[2] The Secretary's proposal led to a series of amendments to Standard 208 that imposed various passive restraint requirements, culminating in a 1977 regulation that mandated such restraints in all cars by the model year 1984. The two commercially available restraints that could satisfy this mandate were airbags and automatic seatbelts; the regulation allowed each vehicle manufacturer to choose which restraint to install. In 1981, however, following a change of administration, the new Secretary first extended the deadline for compliance and then rescinded the passive restraint requirement altogether. In *Motor Vehicle Mfrs. Assn.*, we affirmed a decision by the Court of Appeals holding that this rescission was arbitrary. On remand, Secretary Elizabeth Dole promulgated the version of Standard 208 that is at issue in this case.

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[2] "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by [the National Highway Traffic Safety Administration (NHTSA)] that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed. Reg. 34298." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 35 (1983).

The 1984 standard provided for a phase-in of passive restraint requirements beginning with the 1987 model year. In that year, vehicle manufacturers were required to equip a minimum of 10% of their new passenger cars with such restraints. While the 1987 Honda Accord driven by Ms. Geier was not so equipped, it is undisputed that Honda complied with the 10% minimum by installing passive restraints in certain other 1987 models. This minimum passive restraint requirement increased to 25% of 1988 models and 40% of 1989 models; the standard also mandated that "after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed. Reg. 28999 (1984); see 49 CFR § 571.208, S4.1.3–S4.1.4 (1998). In response to a 1991 amendment to the Safety Act, the Secretary amended the standard to require that, beginning in the 1998 model year, all new cars have an airbag at both the driver's and right front passenger's positions.[3]

Given that Secretary Dole promulgated the 1984 standard in response to our opinion invalidating her predecessor's rescission of the 1977 passive restraint requirement, she provided a full explanation for her decision not to require airbags in all cars and to phase in the new requirements. The initial 3-year delay was designed to give vehicle manufacturers adequate time for compliance. The decision to give manufacturers a choice between airbags and a different form of passive restraint, such as an automatic seatbelt, was motivated in part by safety concerns and in part by a desire not to retard the development of more effective systems. 49 Fed. Reg. 29000–29001 (1984). An important safety concern was the fear of a "public backlash" to an airbag mandate that consumers might not fully understand. The Secretary believed, however, that the use of airbags would avoid possible public objections to automatic seatbelts and that many of the public concerns regarding airbags were unfounded. *Id.*, at 28991.

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[3] See 49 U. S. C. § 30127; 49 CFR § 571.208, S4.1.5.3 (1998). Congress stated that it did not intend its amendment or the Secretary's consequent alteration of Standard 208 to affect the potential liability of vehicle manufacturers under applicable law related to vehicles with or without airbags. 49 U. S. C. § 30127(f)(2).

Although the standard did not require airbags in all cars, it is clear that the Secretary did intend to encourage wider use of airbags. One of her basic conclusions was that "[a]utomatic occupant protection systems that do not totally rely upon belts, such as airbags . . . , offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; their development and availability should be encouraged through appropriate incentives." *Id.*, at 28963; see also *id.*, at 28966, 28986 (noting conclusion of both Secretary and manufacturers that airbags used in conjunction with manual lap and shoulder belts would be "the most effective system of all" for preventing fatalities and injuries). The Secretary therefore included a phase-in period in order to encourage manufacturers to comply with the standard by installing airbags and other (perhaps more effective) nonbelt technologies that they might develop, rather than by installing less expensive automatic seatbelts.[4] As a further incentive for the use of such technologies, the standard provided that a vehicle equipped with an airbag or other nonbelt system would count as 1.5 vehicles for the purpose of determining compliance with the required 10, 25, or 40% minimum passive restraint requirement during the phase-in period. 49 CFR § 571.208, S4.1.3.4(a)(1) (1998). With one oblique exception,[5] there is no mention, either in the text of the final standard or in the accompanying comments, of the possibility that the risk of potential tort liability would provide an incentive for manufacturers to install airbags. Nor is there any other specific evidence of an intent to preclude common-law tort actions.

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[4] "If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply through the use of automatic belts. Thus, by phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better,

## II

Before discussing the pre-emption issue, it is appropriate to note that there is a vast difference between a rejection of Honda's threshold arguments in favor of federal pre-emption and a conclusion that petitioners ultimately would prevail on their common-law tort claims. I express no opinion on the possible merit, or lack of merit, of those claims. I do observe, however, that even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits,[6] I as-

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systems such as airbags and passive interiors." 49 Fed. Reg. 29000 (1984).

[5] In response to a comment that the manufacturers were likely to use the cheapest system to comply with the new standard, the Secretary stated that she believed "that competition, potential liability for any deficient systems[,] and pride in one's product would prevent this." *Ibid.*

[6] *Wood* v. *General Motors Corp.*, 865 F. 2d 395, 417 (CA1 1988) (collecting cases). The result would be different, of course, if petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum federal standard—*e. g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current version of Standard 208. Restatement (Third) of Torts: General Principles § 14(b), and Comment *g* (Discussion Draft, Apr. 5, 1999) ("If the actor's adoption [or rejection] of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt [or reject] that precaution"); cf. *ante*, at 871–872 (dis-

sume that such compliance would be admissible evidence tending to negate charges of negligent and defective design.[7] In addition, if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566, 583–584 (WD Okla. 1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "[g]ood faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law).[8]

The parties have not called our attention to any appellate court opinions discussing the merits of similar no-airbag claims despite the fact that airbag technology was available for many years before the promulgation of the 1984 standard—a standard that is not applicable to any automobiles manufactured before September 1, 1986. Given that an arguable basis for a pre-emption defense did not exist until that standard was promulgated, it is reasonable to infer that the manufacturers' assessment of their potential liability for compensatory and punitive damages on such claims—even

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cussing problem of basing state tort liability upon compliance with mandatory federal regulatory requirement as question of pre-emption rather than of liability on the merits); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal [regulations and state tort law] is a physical impossibility . . .").

[7] Restatement (Third) of Torts: Products Liability § 4(b), and Comment *e* (1997); *Contini* v. *Hyundai Motor Co.*, 840 F. Supp. 22, 23–24 (SDNY 1993). See also Restatement (Second) of Torts § 288C, and Comment *a* (1964) (negligence); *McNeil Pharmaceutical* v. *Hawkins*, 686 A. 2d 567, 577–579 (D. C. 1996) (strict liability).

[8] The subsequent history of *Silkwood* does not cast doubt on this premise. See *Silkwood* v. *Kerr-McGee Corp.*, 667 F. 2d 908, 921–923 (CA10 1981) (reversing on ground that federal law pre-empts award of punitive damages), rev'd and remanded, 464 U. S. 238 (1984), on remand, 769 F. 2d 1451, 1457–1458 (CA10 1985).

without any pre-emption defense—did not provide them with a sufficient incentive to engage in widespread installation of airbags.

Turning to the subject of pre-emption, Honda contends that the Safety Act's pre-emption provision, 15 U. S. C. § 1392(d), expressly pre-empts petitioners' common-law no-airbag claims. It also argues that the claims are in any event impliedly pre-empted because the imposition of liability in cases such as this would frustrate the purposes of Standard 208. I discuss these alternative arguments in turn.

## III

When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. U. S. Const., Art. VI, cl. 2; *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 516 (1992). On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States.[9] Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers—are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so. *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996); *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 116–117 (1992) (SOUTER, J., dissenting) ("If the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred").

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[9] Regrettably, the Court has not always honored the latter proposition as scrupulously as the former. See, *e. g.*, *Boyle* v. *United Technologies Corp.*, 487 U. S. 500 (1988).

When a federal statute contains an express pre-emption provision, "the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993). The Safety Act contains both an express pre-emption provision, 15 U. S. C. § 1392(d), and a saving clause that expressly preserves common-law claims, § 1397(k). The relevant part of the former provides:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard."[10]

The latter states:

> "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[11]

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[10] This provision is now codified at 49 U. S. C. § 30103(b)(1). Because both federal and state opinions construing this provision have consistently referred to it as "§ 1392(d)," I shall follow that practice. Section 1392(d) contains these additional sentences: "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

[11] This provision is now codified at 49 U. S. C. § 30103(e). See nn. 1 and 10, *supra*.

Relying on § 1392(d) and legislative history discussing Congress' desire for uniform national safety standards,[12] Honda argues that petitioners' common-law no-airbag claims are expressly pre-empted because success on those claims would necessarily establish a state "safety standard" not identical to Standard 208. It is perfectly clear, however, that the term "safety standard" as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. That term is used three times in these sections; presumably it is used consistently. *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 570 (1995). The two references to a federal safety standard are necessarily describing an objective administrative rule. 15 U. S. C. § 1392(a). When the pre-emption provision refers to a safety standard established by a "State or political subdivision of a State," therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability—unlike most legislative or administrative rulemaking—necessarily performs an important remedial role in compensating accident victims. Cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 251, 256 (1984).

It is true that in three recent cases we concluded that broadly phrased pre-emptive commands encompassed common-law claims. In *Cipollone* v. *Liggett Group, Inc.*, while we thought it clear that the pre-emption provision in the 1965 Federal Cigarette Labeling and Advertising Act applied only to "rulemaking bodies," 505 U. S., at 518, we concluded that the broad command in the subsequent 1969 amendment that "[n]o requirement or prohibition . . . shall be imposed under State law" did include certain common-law claims. *Id.*, at 548–549 (SCALIA, J., concurring in judgment in part and dissenting in part).[13] In *CSX Transp., Inc.* v. *Easterwood*, where the pre-emption clause of the Federal Railroad Safety Act of 1970 expressly provided that federal railroad safety regulations would pre-empt any incompatible state "'law, rule, regulation, order, or standard relating to railroad safety,'"[14] we held that a federal regulation governing maximum train speed pre-empted a negligence claim that a speed under the federal maximum was excessive. And in *Medtronic, Inc.* v. *Lohr*, we recognized that the statutory reference to "any requirement" imposed by a State or its political subdivisions may include common-law duties. 518 U. S., at 502–503 (plurality opinion); *id.*, at 503–505 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509–512 (O'CONNOR, J., concurring in part and dissenting in part).

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[12] S. Rep. No. 1301, 89th Cong., 2d Sess., 2 (1966); H. R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966).

The statutes construed in those cases differed from the Safety Act in two significant respects. First, the language in each of those pre-emption provisions was significantly broader than the text of § 1392(d). Unlike the broader language of those provisions, the ordinary meaning of the term "safety standard" includes positive enactments, but does not include judicial decisions in common-law tort cases.

Second, the statutes at issue in *Cipollone*, *CSX*, and *Medtronic* did not contain a saving clause expressly preserving common-law remedies. The saving clause in the Safety Act unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common-law liability. In light of this reference to common-law liability in the saving clause, Congress surely would have included a similar reference in § 1392(d) if it had intended to pre-empt such liability. *Chicago* v. *Environmental Defense Fund,* 511 U. S. 328, 338 (1994) (noting presumption that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another).

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[13] The full text of the 1969 provision read: "'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.'" 505 U. S., at 515 (quoting Public Health Cigarette Smoking Act of 1969, 84 Stat. 88).

[14] 507 U. S., at 664 (quoting § 205, 84 Stat. 972, as amended, 45 U. S. C. § 434 (1988 ed. and Supp. II)).

The Court does not disagree with this interpretation of the term "safety standard" in § 1392(d). Because the meaning of that term as used by Congress in this statute is clear, the text of § 1392(d) is itself sufficient to establish that the Safety Act does not expressly pre-empt common-law claims. In order to avoid the conclusion that the saving clause is superfluous, therefore, it must follow that it has a different purpose: to limit, or possibly to foreclose entirely, the possible pre-emptive effect of safety standards promulgated by the Secretary. The Court's approach to the case has the practical effect of reading the saving clause out of the statute altogether.[15]

Given the cumulative force of the fact that § 1392(d) does not expressly pre-empt common-law claims and the fact that § 1397(k) was obviously intended to limit the pre-emptive effect of the Secretary's safety standards, it is quite wrong for the Court to assume that a possible implicit conflict with the purposes to be achieved by such a standard should have the same pre-emptive effect "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ante,* at 873. Properly construed, the Safety Act imposes a special burden on a party relying on an arguable, implicit conflict with a temporary regulatory policy—

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[15] The Court surely cannot believe that Congress included that clause in the statute just to avoid the danger that we would otherwise fail to give the term "safety standard" its ordinary meaning.

rather than a conflict with congressional policy or with the text of any regulation—to demonstrate that a common-law claim has been pre-empted.

## IV

Even though the Safety Act does not expressly pre-empt common-law claims, Honda contends that Standard 208—of its own force—implicitly pre-empts the claims in this case.

> "We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English* v. *General Elec. Co.*, 496 U. S. 72, 78–79 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' *id.*, at 79, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941)." *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 287 (1995).

In addition, we have concluded that regulations "intended to pre-empt state law" that are promulgated by an agency acting nonarbitrarily and within its congressionally delegated authority may also have pre-emptive force. *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153–154 (1982). In this case, Honda relies on the last of the implied pre-emption principles stated in *Freightliner*, arguing that the imposition of common-law liability for failure to install an airbag would frustrate the purposes and objectives of Standard 208.

Both the text of the statute and the text of the standard provide persuasive reasons for rejecting this argument. The saving clause of the Safety Act arguably denies the Secretary the authority to promulgate standards that would pre-empt common-law remedies.[16] Moreover, the text of Standard 208 says nothing about pre-emption, and I am not persuaded that Honda has overcome our traditional presumption that it lacks any implicit pre-emptive effect.

Honda argues, and the Court now agrees, that the risk of liability presented by common-law claims that vehicles without airbags are negligently and defectively designed would frustrate the policy decision that the Secretary made in promulgating Standard 208. This decision, in their view, was that safety—including a desire to encourage "public acceptance of the airbag technology and experimentation with better passive restraint systems" [17]—would best be promoted through gradual implementation of a passive restraint requirement making airbags only one of a variety of systems that a manufacturer could install in order to comply, rather than through a requirement mandating the use of one particular system in every vehicle. In its brief supporting Honda, the United States agreed with this submission. It argued that if the manufacturers had known in 1984 that they might later be held liable for failure to install airbags, that risk "would likely have led them to install airbags in all cars," thereby frustrating the Secretary's safety goals and interfering with the methods designed to achieve them. Brief for United States as *Amicus Curiae* 25.

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[16] The Court contends, in essence, that a saving clause cannot foreclose *implied* conflict pre-emption. *Ante,* at 873–874. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption; they do not establish that a saving clause in a given statute cannot foreclose implied pre-emption based on frustration of that statute's purposes, or even (more importantly for our present purposes) that a saving clause in a given statute cannot deprive a *regulation* issued pursuant to that statute of any implicit pre-emptive effect. See *United States* v. *Locke, ante,* at 104–107; *International Paper Co.* v. *Ouellette,* 479 U. S. 481, 493 (1987) ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action"); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U. S. 311, 328, 331 (1981). As stated in the text, I believe the language of this particular saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary have on common-law remedies. See *Louisiana Pub. Serv. Comm'n* v. *FCC,* 476 U. S. 355, 374 (1986). Under that interpretation, there is by definition no frustration of federal purposes—that is, no "tolerat[ion of] actual conflict," *ante,* at 874—when tort suits are allowed to go forward. Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

[17] 166 F. 3d 1236, 1243 (CADC 1999).

There are at least three flaws in this argument that provide sufficient grounds for rejecting it. First, the entire argument is based on an unrealistic factual predicate. Whatever the risk of liability on a no-airbag claim may have been prior to the promulgation of the 1984 version of Standard 208, that risk did not lead any manufacturer to install airbags in even a substantial portion of its cars. If there had been a realistic likelihood that the risk of tort liability would have that consequence, there would have been no need for Standard 208. The promulgation of that standard certainly did not *increase* the pre-existing risk of liability. Even if the standard did not create a previously unavailable pre-emption defense, it likely *reduced* the manufacturers' risk of liability by enabling them to point to the regulation and their compliance therewith as evidence tending to negate charges of negligent and defective design. See Part II, *supra.* Given that the pre-1984 risk of liability did not lead to widespread airbag installation, this reduced risk of liability was hardly likely to compel manufacturers to install airbags in all cars—or even to compel them to comply with Standard 208 during the phase-in period by installing airbags exclusively.

Second, even if the manufacturers' assessment of their risk of liability ultimately proved to be wrong, the purposes of Standard 208 would not be frustrated. In light of the inevitable time interval between the eventual filing of a tort action alleging that the failure to install an airbag is a design defect and the possible resolution of such a claim against a manufacturer, as well as the additional interval between such a resolution (if any) and manufacturers' "compliance with the state-law duty in question," *ante*, at 882, by modifying their designs to avoid such liability in the future, it is obvious that the phase-in period would have ended long before its purposes could have been frustrated by the specter of tort liability. Thus, even without pre-emption, the public would have been given the time that the Secretary deemed necessary to gradually adjust to the increasing use of airbag technology and allay their unfounded concerns about it. Moreover, even if any no-airbag suits were ultimately resolved against manufacturers, the resulting incentive to modify their designs would have been quite different from a decision by the Secretary to mandate the use of airbags in every vehicle. For example, if the extra credit provided for the use of nonbelt passive restraint technologies during the phase-in period had (as the Secretary hoped) ultimately encouraged manufacturers to develop a nonbelt system more effective than the airbag, manufacturers held liable for failing to install passive restraints would have been free to respond by modifying their designs to include such a system *instead of* an airbag.[18] It seems clear, therefore, that any potential tort liability would not frustrate the Secretary's desire to encourage both experimentation with better passive restraint systems and public acceptance of airbags.

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[18] The Court's failure to "understand [this point] correctly," *ante*, at 883, is directly attributable to its fundamental misconception of the nature of duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design of a vehicle that (like Ms. Geier's) lacked any passive restraints does not amount to an immutable, mandatory "rule of state tort law imposing . . . a duty [to install an airbag]." *Ante*, at 881; see also *ante*, at 871 (referring to verdict in common-law tort suit as a "jury-imposed safety standard"). Rather, that verdict merely reflects the jury's judgment that the manufacturer of a vehicle without any passive restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design—"including, but not limited to, airbags," App. 3—could

Third, despite its acknowledgment that the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor," *ante*, at 870, the Court completely ignores the important fact that by definition all of the standards established under the Safety Act—like the British regulations that governed the number and capacity of lifeboats aboard the *Titanic*[19]—impose minimum, rather than fixed or maximum, requirements. 15 U. S. C. § 1391(2); see *Norfolk Southern R. Co.* v. *Shanklin*, *ante*, at 359 (BREYER, J., concurring) ("[F]ederal *minimum* safety standards should not pre-empt a state tort action"); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 721 (1985). The phase-in program authorized by Standard 208 thus set minimum percentage requirements for the installation of passive restraints, increasing in annual stages of 10, 25, 40, and 100%. Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase. The possibility that exposure to potential tort lia-

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have reduced the foreseeable risks of harm posed by the product. See Restatement (Third) of Torts: Products Liability § 2(b), and Comment *d* (1997); *id.*, § 1, Comment *a* (noting that § 2(b) is rooted in concepts of both negligence and strict liability). Such a verdict obviously does not foreclose the possibility that more than one alternative design exists the use of which would render the vehicle reasonably safe and satisfy the manufacturer's duty of due care. Thus, the Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.

[19] Statutory Rules and Orders 1018–1021, 1033 (1908). See Nader & Page, Automobile-Design Liability and Compliance with Federal Standards, 64 Geo. Wash. L. Rev. 415, 459 (1996) (noting that the *Titanic* "complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about [half] of the people on board"); W. Wade, The *Titanic:* End of a Dream 68 (1986).

bility might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants. Had gradualism been independently important as a method of achieving the Secretary's safety goals, presumably the Secretary would have put a ceiling as well as a floor on each annual increase in the required percentage of new passive restraint installations. For similar reasons, it is evident that variety was not a matter of independent importance to the Secretary. Although the standard allowed manufacturers to comply with the minimum percentage requirements by installing passive restraint systems other than airbags (such as automatic seatbelts), it encouraged them to install airbags and other nonbelt systems that might be developed in the future. The Secretary did not act to ensure the use of a variety of passive restraints by placing ceilings on the number of airbags that could be used in complying with the minimum requirements.[20] Moreover, even if variety and gradualism had been independently important to the Secretary, there is nothing in the standard, the accompanying commentary, or the history of airbag regulation to support the notion that the Secretary intended to advance those purposes at all costs, without regard to the detrimental consequences that pre-emption of tort liability could have for the achievement of her avowed purpose of reducing vehicular injuries. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S., at 257.

My disagreement with Honda and the Government runs deeper than these flaws, however. In its brief, the Government concedes that "[a] claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car . . . would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23.[21] Petitioners' claims here are quite similar to the claim described by the Government: their complaint discusses other design features particular to the 1987 Accord (such as the driver's seat) that allegedly rendered it unreasonably dangerous to operate without an airbag. App. 4–5. The only distinction is that in this case, the particular 1987 Accord driven by Ms. Geier included no passive restraint of any kind because Honda chose to comply with Standard 208's 10% minimum requirement by installing passive restraints in other 1987 models. I fail to see how this distinction makes a difference to the purposes of Standard 208, however. If anything, the type of claim favored by the Government—*e. g.*, that a particular model of car should have contained an airbag instead of an automatic seatbelt—would seem to trench even more severely upon the purposes that the Government and Honda contend were behind the promulgation of Standard 208: that having a variety of passive restraints, rather than only airbags, was necessary to promote safety. Thus, I conclude that the Government, on the Secretary's behalf, has failed to articulate a coherent view of the policies behind Standard 208 that would be frustrated by petitioners' claims.

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[20] Of course, allowing a suit like petitioners' to proceed against a manufacturer that had installed no passive restraint system in a particular vehicle would not even arguably pose an "obstacle" to the auto manufacturers' freedom to choose among several different passive restraint device options. Cf. *ante*, at 878, 881.

## V

For these reasons, it is evident that Honda has not crossed the high threshold established by our decisions regarding pre-emption of state laws that allegedly frustrate federal purposes: it has not demonstrated that allowing a common-law no-airbag claim to go forward would impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objective that the Secretary set forth with clarity in Standard 208. *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S., at 110 (KENNEDY, J., concurring in part and concurring in judgment); *id.*, at 111 ("A freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies,] rather than the courts[,] that pre-emp[t] state law"). Furthermore, it is important to note that the text of Standard 208 (which the Court does not even bother to quote in its opinion), unlike the regulation we reviewed in *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S., at 158, does not contain any expression of an intent to displace state law. Given our repeated emphasis on the importance of the presumption against pre-emption, see, *e. g.*, *CSX Transp., Inc.* v. *Easterwood*, 507 U. S., at 663–664; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), this silence lends additional support to the conclusion that the continuation of whatever common-law liability may exist in a case like this poses no danger of frustrating any of the Secretary's primary purposes in promulgating Standard 208. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S., at 721; *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S., at 251 ("It is difficult to believe that [the Secretary] would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

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[21] Compare *ante,* at 881 (disagreeing with Government's view by concluding that tort-law duty "requir[ing] manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . would [present] an obstacle to the variety and mix of devices that the federal regulation sought"), with *ante,* at 883, 885 (noting that "the agency's own views should make a difference," but contending that the above-quoted Government view is "*not* at issue here").

The Court apparently views the question of pre-emption in this case as a close one. *Ante*, at 883 (relying on Secretary's interpretation of Standard 208's objectives to bolster its finding of pre-emption). Under "ordinary experience-proved principles of conflict pre-emption," *ante*, at 874, therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption, preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes. *Ante,* at 882 (noting that petitioners' arguments "cannot, by themselves, change the legal result"). In view of the important principles upon which the presumption is founded, however, rejecting it in this manner is profoundly unwise.

Our presumption against pre-emption is rooted in the concept of federalism. It recognizes that when Congress legislates "in a field which the States have traditionally occupied . . . [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S., at 230; see *Jones* v. *Rath Packing Co.,* 430 U. S. 519, 525 (1977). The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528, 552 (1985); see *United States* v. *Morrison, ante,* at 660–663 (BREYER, J., dissenting); *Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62, 93–94 (2000) (STEVENS, J., dissenting); *Allied-Bruce Terminix Cos.* v. *Dobson,* 513 U. S. 265, 292–293 (1995) (THOMAS, J., dissenting); *Gregory* v. *Ashcroft,* 501 U. S. 452, 460–464 (1991). In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes—*i. e.,* that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941).[22]

While the presumption is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the pre-emptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally "expect an administrative regulation to declare any intention to pre-empt state law with some specificity."[23] *California Coastal*

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[22] Recently, one commentator has argued that our doctrine of frustration-of-purposes (or "obstacle") pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it. Nelson, Preemption, 86 Va. L. Rev. 225, 231–232 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes"). Obviously, if we were to do so, there would be much less need for the presumption against pre-emption (which the commentator also criticizes). As matters now stand, however, the presumption reduces the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in finding pre-emption based on frustration of purposes.

[23] The Court brushes aside our specificity requirement on the ground that the cases in which we relied upon it were not cases of implied conflict pre-emption. *Ante,* at 884. The Court is quite correct that *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U. S. 707 (1985), and *California Coastal Comm'n* v. *Granite Rock Co.,* 480 U. S. 572 (1987), are cases in which field pre-emption, rather than conflict pre-emption, was at issue. This distinction, however, does not take the Court as far as it

*Comm'n* v. *Granite Rock Co.*, 480 U. S. 572, 583 (1987); see *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S., at 717–718 (noting that too easily implying pre-emption "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence," and stating that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive"); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S., at 154 (noting that pre-emption inquiry is initiated "[w]hen the administrator promulgates regulations intended to pre-empt state law"). This expectation, which is shared by the Executive Branch,[24] serves to ensure that States will be able to have a dialog

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would like. Our cases firmly establish that conflict and field pre-emption are alike in that both are instances of implied pre-emption that by definition do "not [turn] on an express statement of pre-emptive intent." *Ante*, at 884; see, *e. g.*, *Freightliner Corp.* v. *Myrick*, 514 U. S. 280, 287 (1995) (quoted *supra*, at 899); *English* v. *General Elec. Co.*, 496 U. S. 72, 79–80, and n. 5 (1990) (noting that field pre-emption rests on an inference of congressional intent to exclude state regulation and that it "may be understood as a species of conflict pre-emption"); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982). Given that our specificity requirement was adopted in cases involving implied pre-emption, the Court cannot persuasively claim that the requirement is incompatible with our implied pre-emption jurisprudence in the federal regulatory context.

[24] See Exec. Order No. 12612, §4(e), 3 CFR 252, 255 (1988) ("When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings"); Exec. Order No. 13132, §4(e), 64 Fed. Reg. 43255, 43257 (1999) (same); cf. *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 496 (1996) (discussing 21 CFR §808.5 (1995), an FDA regulation allowing a State to request an advisory opinion regarding whether a particular state-law requirement is pre-empted, or exempt from pre-emption, under the Medical Device Amendments of 1976).

with agencies regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U. S. C. § 553.

When the presumption and its underpinnings are properly understood, it is plain that Honda has not overcome the presumption in this case. Neither Standard 208 nor its accompanying commentary includes the slightest specific indication of an intent to pre-empt common-law no-airbag suits. Indeed, the only mention of such suits in the commentary tends to suggest that they would not be pre-empted. See n. 5, *supra.* In the Court's view, however, "[t]he failure of the Federal Register to address pre-emption explicitly is . . . not determinative," *ante,* at 884, because the Secretary's consistent litigating position since 1989, the history of airbag regulation, and the commentary accompanying the final version of Standard 208 reveal purposes and objectives of the Secretary that would be frustrated by no-airbag suits. Pre-empting on these three bases blatantly contradicts the presumption against pre-emption. When the 1984 version of Standard 208 was under consideration, the States obviously were not afforded any notice that purposes might someday be discerned in the history of airbag regulation that would support pre-emption. Nor does the Court claim that the notice of proposed rulemaking that led to Standard 208 provided the States with notice either that the final version of the standard might contain an express pre-emption provision or that the commentary accompanying it might contain a statement of purposes with arguable pre-emptive effect. Finally, the States plainly had no opportunity to comment upon either the commentary accompanying the final version of the standard or the Secretary's *ex post* litigating position that the standard had implicit pre-emptive effect.

Furthermore, the Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from regulatory history and final commentary. The latter two sources are even more malleable than legislative history. Thus, when snippets from them are combined with the Court's broad conception of a doctrine of frustration-of-purposes pre-emption untempered by the presumption, a vast, undefined area of state law becomes vulnerable to pre-emption by any related federal law or regulation. In my view, however, "preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking." 1 L. Tribe, American Constitutional Law § 6–28, p. 1177 (3d ed. 2000).

As to the Secretary's litigating position, it is clear that "an interpretation contained in a [legal brief], not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[,] . . . do[es] not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, *ante*, at 587. Moreover, our pre-emption precedents and the APA establish that even if the Secretary's litigating position were coherent, the lesser deference paid to it by the Court today would be inappropriate. Given the Secretary's contention that he has the authority to promulgate safety standards that pre-empt state law and the fact that he could promulgate a standard such as the one quoted *supra*, at 887, with relative ease, we should be quite reluctant to find pre-emption based only on the Secretary's informal effort to recast the 1984 version of Standard 208 into a pre-emptive mold.[25] See *Hillsborough County* v. *Automated Medical*

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[25] The cases cited by the Court, *ante*, at 883, are not to the contrary. In *City of New York* v. *FCC*, 486 U. S. 57 (1988), for example, we were faced with Federal Communications Commission regulations that explicitly "reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television." *Id.*, at 62, 65. It was only in determining whether the issuance of such regulations was a proper exercise of the authority delegated to the agency by Congress that we afforded a measure of deference to the agency's interpretation of that authority, as *formally* expressed through its explicitly pre-

*Laboratories, Inc.*, 471 U. S., at 721; cf. *Medtronic, Inc.* v. *Lohr*, 518 U. S., at 512 (O'CONNOR, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference"); *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 743–744 (1996). Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking—whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent[26]—respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation. 5 U. S. C. § 551(5); *Paralyzed Veterans of America* v. *D. C. Arena L. P.*, 117 F. 3d 579, 586 (CADC 1997); *National Family Planning & Reproductive Health Assn.* v. *Sullivan*, 979 F. 2d 227, 240 (CADC 1992).

* * *

Because neither the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt

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emptive regulations. *Id.*, at 64; see also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 700–705 (1984) (regulation); *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S., at 158–159 (regulation); *Blum* v. *Bacon*, 457 U. S. 132, 141–142 (1982) (Action Transmittal by Social Security Administration); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S., at 327 (order of Interstate Commerce Commission); *United States* v. *Shimer*, 367 U. S. 374, 377 (1961) (regulation). I express no opinion on whether any deference would be appropriate in any of these situations, but merely observe that such situations are not presented here.

[26] *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S., at 721 (noting that agency "can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements" and to promulgate regulations pre-empting local law that imperils the goals of that program).

petitioners' cause of action, and because I cannot agree with the Court's unprecedented use of inferences from regulatory history and commentary as a basis for implied pre-emption, I am convinced that Honda has not overcome the presumption against pre-emption in this case. I therefore respectfully dissent.

## REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 913 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# ORDERS FOR MARCH 1 THROUGH MAY 25, 2000

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## MARCH 1, 2000

*Dismissal Under Rule 46*

No. 99–423. ALSBROOK *v.* ARKANSAS ET AL. C. A. 8th Cir. [Certiorari granted, 528 U. S. 1146.] Writ of certiorari dismissed under this Court's Rule 46.1.

*Miscellaneous Orders*

No. 99–1240. BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA ET AL. *v.* GARRETT ET AL. C. A. 11th Cir. Joint motion of the parties to expedite consideration of petition for writ of certiorari denied.

No. 99–8449 (99A696). IN RE BARNES. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

## MARCH 2, 2000

*Miscellaneous Order*

No. 99–8473 (99A711). IN RE WRIGHT. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution and set the case for oral argument.

*Certiorari Denied*

No. 99–8472 (99A710). WRIGHT *v.* ALABAMA. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 766 So. 2d 215.

## MARCH 6, 2000

*Certiorari Dismissed*

No. 99–7695. ASHIEGBU *v.* PURVIANCE ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 194 F. 3d 1311.

*Miscellaneous Orders*

No. 99M69. IN RE DELBOSQUE;

No. 99M70. CAMOSCIO *v.* DEMINICO ET AL.; and

No. 99M71. PALMER *v.* BARRAM, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 99–62. SANTA FE INDEPENDENT SCHOOL DISTRICT *v.* DOE, INDIVIDUALLY AND AS NEXT FRIEND FOR HER MINOR CHILDREN, ET AL. C. A. 5th Cir. [Certiorari granted, 528 U. S. 1002.] Motion of Texas et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 99–474. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF MASSACHUSETTS, ET AL. *v.* NATIONAL FOREIGN TRADE COUNCIL. C. A. 1st Cir. [Certiorari granted, 528 U. S. 1018.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–478. APPRENDI *v.* NEW JERSEY. Sup. Ct. N. J. [Certiorari granted, 528 U. S. 1018.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–536. REEVES *v.* SANDERSON PLUMBING PRODUCTS, INC. C. A. 5th Cir. [Certiorari granted, 528 U. S. 985.] Motion of petitioner to strike respondent's lodging appendix denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: 20 minutes for petitioner and 10 minutes for the Solicitor General.

No. 99–830. STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL. *v.* CARHART. C. A. 8th Cir. [Certiorari granted, 528 U. S. 1110.] Motion of Alan Ernest for leave to represent children unborn and born alive denied. Motion of Alan Ernest for leave to file a brief as *amicus curiae* denied.

No. 99–7889. HOLMES *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma* *pauperis* denied. Petitioner is allowed until March 27, 2000, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 99–8017. In re Pares-Ramirez;
No. 99–8109. In re Underwood;
No. 99–8121. In re Jackson; and
No. 99–8139. In re Punchard. Petitions for writs of habeas corpus denied.

No. 99–8082. In re Muhammad. Petition for writ of mandamus denied.

*Certiorari Denied*

No. 99–677. Waterview Management Co. *v.* Federal Deposit Insurance Corporation. C. A. D. C. Cir. Certiorari denied. Reported below: 194 F. 3d 175.

No. 99–766. Consolidated Edison Company of New York et al. *v.* Department of Energy et al. C. A. D. C. Cir. Certiorari denied.

No. 99–782. Public Citizen et al. *v.* Carlin, Archivist of the United States, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 184 F. 3d 900.

No. 99–785. Teicher et al. *v.* Securities and Exchange Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 177 F. 3d 1016.

No. 99–812. Bridenbaugh *v.* O'Bannon, Governor of Indiana. C. A. 7th Cir. Certiorari denied. Reported below: 185 F. 3d 796.

No. 99–922. Ironworkers Local 386 *v.* Warshawsky & Co. et al. C. A. D. C. Cir. Certiorari denied. Reported below: 182 F. 3d 948.

No. 99–978. Michaels, Executor of the Estate of Nelson, Deceased *v.* Bank of America N. T. & S. A. et al. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 474.

No. 99–1012. Scarfo *v.* Ginsberg et al. C. A. 11th Cir. Certiorari denied. Reported below: 175 F. 3d 957.

No. 99–1098. Barth *v.* Public Service Electric and Gas et al. C. A. 3d Cir. Certiorari denied. Reported below: 193 F. 3d 514.

No. 99–1117. Heard *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 187 Ill. 2d 36, 718 N. E. 2d 58.

No. 99–1124. C. Volante Corp. *v.* Brown et al. C. A. 2d Cir. Certiorari denied. Reported below: 194 F. 3d 351.

No. 99–1125. Kansas Public Employees Retirement System, Inc. *v.* Reimer & Koger Associates, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 194 F. 3d 922.

No. 99–1129. Aziz *v.* Bluefield State College. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1303.

No. 99–1130. Clanton *v.* Township of Redford. Ct. App. Mich. Certiorari denied.

No. 99–1131. Medical Society of New Jersey et al. *v.* Robins, President, New Jersey State Board of Medical Examiners, et al. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 321 N. J. Super. 586, 729 A. 2d 1056.

No. 99–1136. Phillips *v.* CSX Transportation, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 190 F. 3d 285.

No. 99–1158. Lal *v.* State System of Higher Education of Pennsylvania (SSHE) et al. C. A. 3d Cir. Certiorari denied. Reported below: 185 F. 3d 862.

No. 99–1200. Hershfield *v.* Town of Colonial Beach et al. Ct. App. Va. Certiorari denied.

No. 99–1229. Ratcliff *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 637.

No. 99–1234. Hill, Warden *v.* Bell. C. A. 9th Cir. Certiorari denied. Reported below: 190 F. 3d 1089.

No. 99–1252. Pride *v.* Missouri. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 1 S. W. 3d 494.

No. 99–1253. Rodriguez *v.* West, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 189 F. 3d 1351.

No. 99–1262. Razzaq *v.* Old Dominion University et al. C. A. 4th Cir. Certiorari denied. Reported below: 181 F. 3d 90.

No. 99–1267. Schlamer *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 52 M. J. 80.

No. 99–1271. Qualls *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 99–1286. Accardi et ux. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 190 F. 3d 781.

No. 99–1293. Briscoe *v.* International Business Machines Corp. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1321.

No. 99–1311. Cash *v.* Tennessee. C. A. 6th Cir. Certiorari denied.

No. 99–1322. Cowhig *v.* Caldera, Secretary of the Army. C. A. 1st Cir. Certiorari denied. Reported below: 181 F. 3d 79.

No. 99–1326. Stewart *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 203 F. 3d 827.

No. 99–1327. Hines *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 187 F. 3d 632.

No. 99–1355. Smith *v.* Texas et al. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 99–6626. Mancillas *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 183 F. 3d 682.

No. 99–6789. Ebert *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 178 F. 3d 1287.

No. 99–6921. Castillo *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 188 F. 3d 519.

No. 99–6925. Weathers *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 186 F. 3d 948.

No. 99–7310. White *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 194 Ariz. 344, 982 P. 2d 819.

No. 99–7324. Earp *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 20 Cal. 4th 826, 978 P. 2d 15.

No. 99–7603. Corey *v.* Health South Corporation of Alabama et al. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–7605. Corey *v.* Florida State Division of Human Services. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–7607. Corey *v.* Retchin, Judge, Superior Court of the District of Columbia. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–7608. Corey *v.* Sidransky. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–7609. Corey *v.* Corey et al. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–7610. Corey *v.* Pamper et al. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–7611. Corey *v.* Dowling et al. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–7612. Abe *v.* Michigan State University. Ct. App. Mich. Certiorari denied.

No. 99–7622. McGilberry *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 741 So. 2d 894.

No. 99–7626. Ioane *v.* Triplett et al. C. A. 9th Cir. Certiorari denied.

No. 99–7629. Britz *v.* Cowan, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 192 F. 3d 1101.

No. 99–7632. Thomas, aka Turner *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–7637. Hedgepeth *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 350 N. C. 776, 517 S. E. 2d 605.

No. 99–7641. Fee *v.* Borgert, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 194 F. 3d 1312.

No. 99–7642. FALCON *v.* RICHMOND POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 253.

No. 99–7643. HIBBERT *v.* TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–7644. GASKIN *v.* WARD, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–7645. HAYNES ET VIR *v.* MATTINA ET AL. C. A. 2d Cir. Certiorari denied.

No. 99–7646. HORSLEY *v.* BUSH, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–7647. FRANCIS *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 743 So. 2d 12.

No. 99–7653. MATHONICAN *v.* TEXAS ET AL. (two judgments). C. A. 5th Cir. Certiorari denied.

No. 99–7655. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 304 Ill. App. 3d 883, 711 N. E. 2d 360.

No. 99–7656. FRYE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–7658. FAIR *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 733 So. 2d 515.

No. 99–7660. HINES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–7662. HYCHE *v.* CHRISTENSEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 99–7663. FRANKS *v.* MARTIN ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–7665. DURACHKO *v.* MCCULLOUGH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE. C. A. 3d Cir. Certiorari denied.

No. 99–7666. Geary *v.* McKinney et al. Sup. Ct. Colo. Certiorari denied.

No. 99–7670. Deal *v.* Catoe, Director, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 168 F. 3d 481.

No. 99–7671. Gonzalez *v.* United States Court of Appeals for the Ninth Circuit. C. A. 9th Cir. Certiorari denied.

No. 99–7673. Schaefer *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 238 Ga. App. 594, 519 S. E. 2d 248.

No. 99–7676. Lindsey *v.* Catoe, Director, South Carolina Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 187 F. 3d 630.

No. 99–7677. Steele *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 741 So. 2d 487.

No. 99–7680. Valadez *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–7688. Antonio Gonzalez *v.* Texas. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 99–7696. Mann *v.* Taft, Stettinius & Hollister et al. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 99–7697. McLaughlin *v.* Cotner. C. A. 6th Cir. Certiorari denied. Reported below: 193 F. 3d 410.

No. 99–7698. Johnson *v.* Angelone, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 182 F. 3d 908.

No. 99–7700. Coombs *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied.

No. 99–7705. Kulka *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 99–7706. Tunstall *v.* Kavanagh, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1328.

No. 99–7710. Mays *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–7713. Jennings *v.* Wyoming et al. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 477.

No. 99–7717. Crosby *v.* Lambert et al. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1326.

No. 99–7723. White *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–7726. Wise *v.* Caddell Construction Co., Inc. C. A. 11th Cir. Certiorari denied. Reported below: 203 F. 3d 841.

No. 99–7736. Boulineau *v.* Garner, Commissioner, Georgia Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 184 F. 3d 825.

No. 99–7737. Calhoun *v.* DeTella, Warden, et al. C. A. 7th Cir. Certiorari denied.

No. 99–7754. Abbey *v.* Robert Bosch GmbH et al. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 853.

No. 99–7819. Glass *v.* Terhune, Director, California Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 182 F. 3d 925.

No. 99–7871. Marsh *v.* Madrid, Attorney General of New Mexico. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 258.

No. 99–7874. Mayeux *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 99–7905. Merritt *v.* Price, Superintendent, State Correctional Institution at Pittsburgh. C. A. 3d Cir. Certiorari denied.

No. 99–7998. Flowers *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–7999. Hiivala *v.* Lambert, Superintendent, Washington State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 195 F. 3d 1098.

No. 99–8005. Hayes *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 438.

No. 99–8013. Ifabiyi, aka DeBrown, aka Bell, aka Bello *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 194 F. 3d 1308.

No. 99–8032. Sanjurjo *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 239.

No. 99–8033. Reynolds *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 241.

No. 99–8038. Anderson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 201 F. 3d 445.

No. 99–8041. Long *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8045. Cox *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 181 F. 3d 104.

No. 99–8051. Rogers *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 429.

No. 99–8052. Morales et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 185 F. 3d 74.

No. 99–8056. Anderson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 454.

No. 99–8058. Armendariz-Mata *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 99–8059. Cortinas *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 523.

No. 99–8062. Anderson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 262.

No. 99–8065. Cabana *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 127 Md. App. 778.

No. 99–8067. Shue *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–8074. Mikalajunas *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 186 F. 3d 490.

No. 99–8075. MYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 248.

No. 99–8077. LARKINS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 99–8078. KEE MANN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 193 F. 3d 1172.

No. 99–8080. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 279.

No. 99–8083. MAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 53.

No. 99–8087. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 818.

No. 99–8091. ROBISON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 449.

No. 99–8093. STUEBING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 202 F. 3d 264.

No. 99–8094. MACK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 99–8099. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 99–8101. SCAFF-MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 182 F. 3d 935.

No. 99–8103. NELSON *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8105. AJIBOYE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1352.

No. 99–8115. GOMEZ SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 659.

No. 99–8118. ROMERO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 189 F. 3d 576.

No. 99–8124. Padilla-Mena *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 201 F. 3d 445.

No. 99–8125. Robinson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–866. Orson, Inc., t/a Roxy Screening Rooms *v.* Miramax Film Corp. C. A. 3d Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 189 F. 3d 377.

No. 99–944. Chenoweth, Member of Congress, et al. *v.* Clinton, President of the United States, et al. C. A. D. C. Cir. Motion of Landmark Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 181 F. 3d 112.

No. 99–950. Consolidated Rail Corporation *v.* Wightman, Administratrix of the Estate of Wightman, Deceased, et al. Sup. Ct. Ohio. Motions of Alliance of American Insurers et al. and Association of American Railroads for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 86 Ohio St. 3d 431, 715 N. E. 2d 546.

No. 99–981. Pennsylvania *v.* Halye. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 719 A. 2d 763.

No. 99–1041. Pryor, Attorney General of Alabama, et al. *v.* Summit Medical Associates, P. C., et al. C. A. 11th Cir. Motion of James Clancy for leave to file a brief as *amicus curiae* denied. Certiorari denied. Reported below: 180 F. 3d 1326.

*Rehearing Denied*

No. 98–9749. McFall *v.* Department of Agriculture, 528 U. S. 1003;

No. 99–5960. Rodriguez *v.* Moore, Secretary, Florida Department of Corrections, et al., 528 U. S. 971;

No. 99–6507. Pravda *v.* Saratoga County, New York, et al., 528 U. S. 1063;

No. 99–6915. In re Dorrough, 528 U. S. 1017; and

No. 99–7105. Eaton *v.* Dakota County Housing Redevelopment Authorities et al., 528 U. S. 1131. Petitions for rehearing denied.

No. 99–5746. WEEKS *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 528 U. S. 225. Stay of execution of sentence of death granted September 1, 1999, vacated. Petition for rehearing denied.

## MARCH 8, 2000

*Miscellaneous Order*

No. 99A726. GIBSON, WARDEN *v.* LAFEVERS. Application to vacate order of the United States Court of Appeals for the Tenth Circuit, entered March 7, 2000, directing entry of an order staying execution of respondent, presented to JUSTICE BREYER, and by him referred to the Court, denied.

## MARCH 14, 2000

*Certiorari Denied*

No. 99–8616 (99A760). RICH *v.* WOODFORD, WARDEN, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied.

## MARCH 15, 2000

*Certiorari Dismissed*

No. 99–8615 (99A759). POLAND *v.* STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari dismissed for want of jurisdiction.

*Miscellaneous Order*

No. 99–8625 (99A761). IN RE POLAND. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

*Certiorari Denied*

No. 99–8597 (99A741). POLAND *v.* ARIZONA. Super. Ct. Ariz., Yavapai County. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution.

MARCH 16, 2000

*Miscellaneous Order*

No. 99A750. HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL.; and

No. 99A757. SMALLWOOD ET AL. *v.* CROMARTIE ET AL. Applications for stay of judgment of the United States District Court for the Eastern District of North Carolina, case No. 4:96–CV–104–BO(3), entered March 8, 2000, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending the timely docketing of the appeals in this Court. Should the jurisdictional statements be timely filed, this order shall remain in effect pending this Court's action on the appeals. If the appeals are dismissed or the judgment affirmed, this order shall terminate automatically. In the event jurisdiction is noted or postponed, this order will remain in effect pending the sending down of the judgment of this Court.

MARCH 20, 2000

*Certiorari Dismissed*

No. 99–7818. FORD *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 99–8071. KOWALSKI *v.* OREGON STATE BAR. Sup. Ct. Ore. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. D–2127. IN RE DISBARMENT OF THOMAS. Disbarment entered. [For earlier order herein, see 528 U. S. 1043.]

No. D–2129. IN RE DISBARMENT OF HORN. Disbarment entered. [For earlier order herein, see 528 U. S. 1071.]

No. D–2131. IN RE DISBARMENT OF ZEEGERS. Disbarment entered. [For earlier order herein, see 528 U. S. 1071.]

No. D–2132. IN RE DISBARMENT OF GRINDLE. Disbarment entered. [For earlier order herein, see 528 U. S. 1071.]

No. D–2133. In re Disbarment of Philomena. Disbarment entered. [For earlier order herein, see 528 U. S. 1071.]

No. D–2135. In re Disbarment of Kuhlman. Disbarment entered. [For earlier order herein, see 528 U. S. 1072.]

No. D–2136. In re Disbarment of Miller. Disbarment entered. [For earlier order herein, see 528 U. S. 1072.]

No. D–2138. In re Disbarment of Jones. Disbarment entered. [For earlier order herein, see 528 U. S. 1112.]

No. D–2139. In re Disbarment of Hencke. Disbarment entered. [For earlier order herein, see 528 U. S. 1112.]

No. 99M72. Swartz *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division;

No. 99M73. Clendenin *v.* Virginia Department of Social Services; and

No. 99M74. Iacobucci *v.* Boulter. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 8, Orig. Arizona *v.* California et al. Motion of the Solicitor General for divided argument granted. [For earlier order herein, see, *e. g.*, 528 U. S. 1147.]

No. 105, Orig. Kansas *v.* Colorado. Motion of the Special Master for fees and reimbursement of expenses granted, and the Special Master is awarded a total of $112,783.95 for the period March 3, 1999, through January 28, 2000, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 526 U. S. 1048.]

No. 99–658. Castillo et al. *v.* United States. C. A. 5th Cir. [Certiorari granted, 528 U. S. 1109.] Motion of Law Enforcement Alliance of America for leave to file a brief as *amicus curiae* granted. Motion of petitioner Brad Eugene Branch for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Richard G. Ferguson, of Waco, Tex., be appointed to serve as counsel for petitioner Brad Eugene Branch. Request for expenses and attorney's fees denied without prejudice. Motion of petitioner Renos Lenny Avraam for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that John F. Carroll, Esq., of San Antonio, Tex., be appointed to serve as counsel for petitioner

Renos Lenny Avraam. Request for expenses and attorney's fees denied without prejudice.

No. 99–830. STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL. *v.* CARHART. C. A. 8th Cir. [Certiorari granted, 528 U. S. 1110.] Motion of National Association of Prolife Nurses, Inc., for leave to file a brief as *amicus curiae* granted. Motions of Right to Life Advocates, Inc., National Association for the Protection of Unborn Children, James J. Clancy, and Texas Black Americans for Life et al. for leave to file briefs as *amici curiae* denied.

No. 99–7401. TURNER *v.* UNITED STATES. C. A. Fed. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [528 U. S. 1111] denied.

No. 99–7402. TURNER *v.* VIRGINIA. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [528 U. S. 1134] denied.

No. 99–8191. IN RE HELGOTH;
No. 99–8203. IN RE DECKER;
No. 99–8213. IN RE SMITH;
No. 99–8267. IN RE HARRIS;
No. 99–8275. IN RE ADIO-MOWO;
No. 99–8288. IN RE SANDERS;
No. 99–8380. IN RE HAYNES ET VIR;
No. 99–8395. IN RE MURRAY;
No. 99–8427. IN RE SERRANO; and
No. 99–8441. IN RE SAUNDERS. Petitions for writs of habeas corpus denied.

No. 99–8425. IN RE RICHARDS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 99–1369. IN RE GOULDING;
No. 99–7788. IN RE WATERS;

No. 99–8089. In re Paglingayen; and

No. 99–8294. In re Jarvis. Petitions for writs of mandamus denied.

No. 99–1316. In re Wojciechowski; and

No. 99–1351. In re Marcone. Petitions for writs of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 99–859. Central Green Co. *v.* United States. C. A. 9th Cir. Certiorari granted. Reported below: 177 F. 3d 834.

No. 99–804. Cleveland *v.* United States. C. A. 5th Cir. Certiorari granted limited to Question 1 as presented by the petition. Reported below: 182 F. 3d 296.

No. 99–1038. Eastern Associated Coal Corp. *v.* United Mine Workers of America, District 17, et al. C. A. 4th Cir. Motion of Institute for a Drug-Free Workplace for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 188 F. 3d 501.

No. 99–1185. Seling, Superintendent, Special Commitment Center *v.* Young. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 192 F. 3d 870.

*Certiorari Denied*

No. 99–818. Guam Economic Development Authority *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 179 F. 3d 630.

No. 99–837. Conley *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 186 F. 3d 7.

No. 99–882. Copper et al. *v.* City of Fargo et al. C. A. 8th Cir. Certiorari denied. Reported below: 184 F. 3d 994.

No. 99–919. Balfour Beatty Bahamas Ltd. *v.* Bush. C. A. 11th Cir. Certiorari denied. Reported below: 170 F. 3d 1048.

No. 99–920. Riley et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 3d 888.

No. 99–959. American Federation of Government Employees, AFL–CIO, et al. *v.* Clinton, President of the United States, et al. C. A. 6th Cir. Certiorari denied. Reported below: 180 F. 3d 727.

No. 99–961. Mapoy *v.* Carroll, District Director, Department of Justice, Immigration and Naturalization Service. C. A. 4th Cir. Certiorari denied. Reported below: 185 F. 3d 224.

No. 99–969. Mistick PBT *v.* Housing Authority of the City of Pittsburgh et al. C. A. 3d Cir. Certiorari denied. Reported below: 186 F. 3d 376.

No. 99–985. Keeler Die Cast *v.* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, et al. C. A. 6th Cir. Certiorari denied. Reported below: 185 F. 3d 535.

No. 99–986. Byrd *v.* Environmental Protection Agency. C. A. D. C. Cir. Certiorari denied. Reported below: 174 F. 3d 239.

No. 99–989. Brown *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 186 F. 3d 1055.

No. 99–991. Griffith et al. *v.* Arkansas Department of Pollution Control and Ecology et al. C. A. 8th Cir. Certiorari denied.

No. 99–1001. Dart *v.* Dart. Sup. Ct. Mich. Certiorari denied. Reported below: 460 Mich. 573, 597 N. W. 2d 82.

No. 99–1010. Big D Enterprises, Inc., et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 184 F. 3d 924.

No. 99–1013. Miccosukee Tribe of Indians of Florida et al. *v.* Tamiami Partners, LTD, By and Through Its General Partner, Tamiami Development Corp. C. A. 11th Cir. Certiorari denied. Reported below: 177 F. 3d 1212.

No. 99–1015. Mauro *v.* Arpaio, Sheriff, Maricopa County, et al. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 1054.

No. 99–1016. PEREIRA, CHAPTER 11 TRUSTEE, ESTATE OF PAYROLL EXPRESS CORP., ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 186 F. 3d 196.

No. 99–1019. WORTHINGTON CORP. *v.* RONSINI, EXECUTRIX OF THE ESTATE OF RONSINI. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 256 App. Div. 2d 250, 683 N. Y. S. 2d 39.

No. 99–1021. LAUDERBAUGH *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 52 M. J. 438.

No. 99–1034. CENTURY CLINIC, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 475.

No. 99–1039. SIBLEY *v.* LEMAIRE, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 3d 481.

No. 99–1043. OKOLIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–1054. BUCKWALTER ET AL. *v.* COUNTY OF CLARK ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 58, 974 P. 2d 1162.

No. 99–1069. MONTGOMERY COUNTY PUBLIC SCHOOLS ET AL. *v.* EISENBERG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 197 F. 3d 123.

No. 99–1099. LUKAN *v.* SCOTT, SUPERINTENDENT, NORTH FOREST INDEPENDENT SCHOOL DISTRICT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 183 F. 3d 342.

No. 99–1113. DOBBS-WEINSTEIN *v.* VANDERBILT UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 185 F. 3d 542.

No. 99–1148. CANNICE *v.* NORWEST BANK IOWA, N. A., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 189 F. 3d 723.

No. 99–1160. COMFORT SILKIE COMPANY CORP. *v.* SIEFERT, DBA BAREFOOT DREAMS. C. A. Fed. Cir. Certiorari denied. Reported below: 215 F. 3d 1344.

No. 99–1175. GOROD *v.* PROVANZANO ET AL. Super. Ct. Mass., Middlesex County. Certiorari denied.

No. 99–1180. Zinsmeyer Trusts Partnership *v.* PaineWebber Group, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 3d 988.

No. 99–1187. Barr, Judge, 337th District Court of Harris County, Texas *v.* Texas Commission on Judicial Conduct. Sup. Ct. Tex. Certiorari denied.

No. 99–1189. Johnson *v.* Anderson. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 732 So. 2d 423.

No. 99–1190. Baca, Sheriff, County of Los Angeles *v.* Lee et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 73 Cal. App. 4th 1116, 86 Cal. Rptr. 2d 913.

No. 99–1194. Warden *v.* California State Bar et al. Sup. Ct. Cal. Certiorari denied. Reported below: 21 Cal. 4th 628, 982 P. 2d 154.

No. 99–1195. Varfes *v.* Newland, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 256.

No. 99–1198. Springer *v.* Infinity Group Co. et al. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 478.

No. 99–1199. Read *v.* New York. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1323.

No. 99–1204. Rautenberg *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 459.

No. 99–1205. Owsley et al. *v.* San Antonio Independent School District. C. A. 5th Cir. Certiorari denied. Reported below: 187 F. 3d 521.

No. 99–1206. Hahn et ux. *v.* Star Bank et al. C. A. 6th Cir. Certiorari denied. Reported below: 190 F. 3d 708.

No. 99–1207. Olin Corp. *v.* Cullen. C. A. 7th Cir. Certiorari denied. Reported below: 195 F. 3d 317.

No. 99–1211. Boss Capital, Inc. *v.* City of Casselberry. C. A. 11th Cir. Certiorari denied. Reported below: 187 F. 3d 1251.

No. 99–1213. Williams et al. *v.* Michigan et al. C. A. 6th Cir. Certiorari denied. Reported below: 182 F. 3d 920.

No. 99–1214. Caterpillar Inc. et al. *v.* New Hampshire Department of Revenue et al. Sup. Ct. N. H. Certiorari denied. Reported below: 144 N. H. 253, 741 A. 2d 56.

No. 99–1215. Batts et al. *v.* Clinton et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–1221. Ford Motor Co. *v.* Ammerman, Guardian of Ammerman, et al. Ct. App. Ind. Certiorari denied. Reported below: 705 N. E. 2d 539.

No. 99–1226. Wilson et al. *v.* Miller et al. C. A. 5th Cir. Certiorari denied. Reported below: 190 F. 3d 537.

No. 99–1228. Howe *v.* Richardson et al. C. A. 1st Cir. Certiorari denied. Reported below: 193 F. 3d 60.

No. 99–1237. Zahran et ux. *v.* Cleary Building Corp. et al. C. A. 7th Cir. Certiorari denied. Reported below: 182 F. 3d 923.

No. 99–1241. Children's Hospital of Philadelphia et al. *v.* Cunningham et al. Ct. Common Pleas of Philadelphia County, Pa. Certiorari denied.

No. 99–1251. Beachy *v.* Boise Cascade Corp. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 1010.

No. 99–1254. Thomas *v.* District of Columbia Court of Appeals Board on Professional Responsibility. Ct. App. D. C. Certiorari denied. Reported below: 740 A. 2d 538.

No. 99–1260. Weldon et ux. *v.* Farm Credit Services of Michigan's Heartland, PCA. Ct. App. Mich. Certiorari denied. Reported below: 232 Mich. App. 662, 591 N. W. 2d 438.

No. 99–1269. Taylor *v.* Iowa. Ct. App. Iowa. Certiorari denied.

No. 99–1282. Willman *v.* Straub, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–1290. Norwood *v.* Western Federal Credit Union et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–1299. Alhilawi *v.* Alaska. Super. Ct. Alaska, 1st Jud. Dist. Certiorari denied.

No. 99–1303. Williams *v.* Henderson, Postmaster General. C. A. 11th Cir. Certiorari denied. Reported below: 194 F. 3d 1324.

No. 99–1312. Valhalla Cemetery Co., Inc. *v.* Monroe, Commissioner, Alabama Department of Revenue. Ct. Civ. App. Ala. Certiorari denied. Reported below: 749 So. 2d 470.

No. 99–1315. Fizzano Brothers Concrete Products, Inc. *v.* Santerian et al. Super. Ct. Pa. Certiorari denied. Reported below: 737 A. 2d 1283.

No. 99–1323. Hawkins *v.* Texas Commission for Lawyer Discipline. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 988 S. W. 2d 927.

No. 99–1341. Van Ness Associates, Ltd. *v.* Mitsubishi Bank, Ltd., et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–1357. Hughes et al. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 191 F. 3d 1317.

No. 99–1365. Nicolas *v.* Panama Canal Commission. C. A. D. C. Cir. Certiorari denied.

No. 99–1366. Kaplan *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 99–1382. Thornton *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 241.

No. 99–1384. Castro *v.* Edwards, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–1400. Cranford *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 453.

No. 99–1405. Kuhn *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–6558. Battle *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 173 F. 3d 1343.

No. 99–6684. Dones *v.* Johnson, Superintendent, Orleans Correctional Facility; and Glaude *v.* Artuz, Superintend-

ENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 182 F. 3d 899 (first judgment); 189 F. 3d 460 (second judgment).

No. 99–7101. HOLLOWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 156 F. 3d 1240.

No. 99–7127. FARHAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 190 F. 3d 1097.

No. 99–7129. FRATTA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–7178. TSU ET UX. *v.* TRACY FEDERAL BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 172 F. 3d 59.

No. 99–7183. WOODS ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 21 Cal. 4th 668, 981 P. 2d 1019.

No. 99–7349. LOY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 191 F. 3d 360.

No. 99–7409. LANE *v.* NATIONAL DATA CORP. C. A. 11th Cir. Certiorari denied. Reported below: 180 F. 3d 272.

No. 99–7475. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 196 F. 3d 1256.

No. 99–7505. LUCKY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 755 So. 2d 845.

No. 99–7554. MORGAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 187 Ill. 2d 500, 719 N. E. 2d 681.

No. 99–7720. RETTIG *v.* KENT CITY SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 637.

No. 99–7728. ORTIZ *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–7738. RODRIGUEZ *v.* LITSCHER, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 99–7739. Smith *v.* Barrios. C. A. 5th Cir. Certiorari denied.

No. 99–7743. Baque *v.* Moore, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 99–7751. Tuesno *v.* Cain, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 198 F. 3d 242.

No. 99–7752. Thomas *v.* Larned State Hospital et al. Ct. App. Kan. Certiorari denied. Reported below: 26 Kan. App. 2d —, 983 P. 2d 288.

No. 99–7753. Bayon *v.* Cisek et al. C. A. 2d Cir. Certiorari denied.

No. 99–7755. Colarte *v.* LeBlanc, Warden. C. A. 5th Cir. Certiorari denied.

No. 99–7756. Stephens *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 93 Wash. App. 1055.

No. 99–7762. Robinson *v.* Luker et al. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 437.

No. 99–7763. Johnson *v.* Lumbermens Mutual Casualty Co. et al. C. A. 4th Cir. Certiorari denied. Reported below: 175 F. 3d 1014.

No. 99–7766. Morton *v.* Tessmer, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–7767. Kanazeh *v.* Lockheed Martin et al. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 502.

No. 99–7768. McNeil *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 350 N. C. 657, 518 S. E. 2d 486.

No. 99–7769. Morganherring *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 350 N. C. 701, 517 S. E. 2d 622.

No. 99–7775. Alvarado *v.* McKay et al. Ct. App. Minn. Certiorari denied.

No. 99–7778. Crawford *v.* Yukins, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–7783. Underwood *v.* Jeffcoat et al. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 437.

No. 99–7784. Trice *v.* Sikes, Warden. C. A. 11th Cir. Certiorari denied.

No. 99–7785. Thomas *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–7786. Zoglauer *v.* Zoglauer et al. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 302 Ill. App. 3d 1101, 746 N. E. 2d 914.

No. 99–7787. Walker *v.* Dinning. C. A. 7th Cir. Certiorari denied.

No. 99–7795. Nubine *v.* Martin, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 478.

No. 99–7797. Lewis *v.* Jones et al. C. A. 11th Cir. Certiorari denied.

No. 99–7799. Carter *v.* City of Rayville et al. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 520.

No. 99–7800. Smith *v.* Garcia, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1333.

No. 99–7803. Gonzales *v.* New Mexico. Sup. Ct. N. M. Certiorari denied. Reported below: 128 N. M. 44, 989 P. 2d 419.

No. 99–7804. Hakim *v.* Jacob et al. Sup. Ct. Mich. Certiorari denied. Reported below: 459 Mich. 992, 595 N. W. 2d 846.

No. 99–7805. Foster *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 99–7806. Hughes *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 336 S. C. 585, 521 S. E. 2d 500.

No. 99–7812. DeCloud *v.* Bowersox, Superintendent, Potosi Correctional Center, et al. C. A. 8th Cir. Certiorari denied.

No. 99–7816. Hamilton *v.* Stegall, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–7820. Grover *v.* Boyd et al. C. A. 7th Cir. Certiorari denied. Reported below: 182 F. 3d 921.

No. 99–7821. Hornsby *v.* Evans, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 188 F. 3d 518.

No. 99–7829. Smithey *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 20 Cal. 4th 936, 978 P. 2d 1171.

No. 99–7832. Williams *v.* Norwest Mortgage, Inc. Sup. Ct. Fla. Certiorari denied. Reported below: 743 So. 2d 16.

No. 99–7834. Manzanares *v.* Ohio. Ct. App. Ohio, Wood County. Certiorari denied.

No. 99–7835. McLean *v.* Osborne, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 502.

No. 99–7841. Leal *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 99–7846. Mendoza *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–7850. Williams *v.* Corrections Corporation of America et al. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 439.

No. 99–7851. Amado Lajara *v.* Morgan, Warden. C. A. 11th Cir. Certiorari denied.

No. 99–7853. Beeson *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 537, 24 P. 3d 229.

No. 99–7854. Travaglia *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 723 A. 2d 190.

No. 99–7857. Ayele *v.* Allright Boston Parking, Inc., et al. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 426.

No. 99–7858. Chenard *v.* Nevada Department of Human Resources, Welfare Division. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 574, 24 P. 3d 269.

No. 99–7882. KING *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 99–7893. HALL *v.* UNITED STATES; and
No. 99–7897. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 171 F. 3d 1133.

No. 99–7930. MACEMON *v.* MORGAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 274.

No. 99–7934. JACKSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 194 F. 3d 641.

No. 99–7942. BARNES *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–7949. STROUTH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 999 S. W. 2d 759.

No. 99–7954. ROBEDEAUX *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 478.

No. 99–7956. MCCALLUM *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 194 F. 3d 1323.

No. 99–7976. FOSTER *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 182 F. 3d 1177.

No. 99–7995. MACKAY *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 856.

No. 99–8014. KIRKSEY *v.* UNITED STATES; and
No. 99–8159. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 820.

No. 99–8037. BUMGARDNER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 99–8055. KEMPER *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 250.

No. 99–8079. CHANEY *v.* NEW ORLEANS PUBLIC FACILITY MANAGEMENT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 179 F. 3d 164.

No. 99–8085. Barkley *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8090. Smith *v.* Tally, Warden. C. A. 7th Cir. Certiorari denied.

No. 99–8107. Clabourne *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: 194 Ariz. 379, 983 P. 2d 748.

No. 99–8117. Santos *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 99–8120. Midgett *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 143.

No. 99–8126. Rainey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 824.

No. 99–8127. Sanders *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 637.

No. 99–8129. Cobbs *v.* United States Postal Service et al. C. A. 6th Cir. Certiorari denied.

No. 99–8130. Cancassi *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 99–8133. Smith *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 196 F. 3d 1034.

No. 99–8135. Turnley *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 190 F. 3d 483.

No. 99–8138. Stevens *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 505.

No. 99–8142. Monaco et ux. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 194 F. 3d 381 and 199 F. 3d 1324.

No. 99–8148. Hernandez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 785.

No. 99–8152. Daly *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 99–8154. Excinia *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1306.

No. 99–8155. Floyd *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–8164. Uthman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–8166. Emmanuel *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 438.

No. 99–8167. Hamlin *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 202 F. 3d 255.

No. 99–8168. Horn *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 3d 781.

No. 99–8173. Stevenson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 438.

No. 99–8174. Quintanilla *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 193 F. 3d 1139.

No. 99–8175. Jones *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 195 F. 3d 205.

No. 99–8177. Layne *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 192 F. 3d 556.

No. 99–8178. Martinez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 820.

No. 99–8180. Stull *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 818.

No. 99–8182. Bender *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 737 So. 2d 1181.

No. 99–8183. Adams *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 179 F. 3d 793.

No. 99–8185. Baker *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 203 F. 3d 840.

No. 99–8187. Onaro *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 275.

No. 99–8188. Springfield *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 196 F. 3d 1180.

No. 99–8189. Ortega *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8190. Christian *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 187 F. 3d 663.

No. 99–8194. Dove *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 182 F. 3d 901.

No. 99–8198. Davenport *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1120.

No. 99–8199. Harrison *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 187 F. 3d 632.

No. 99–8202. Villa *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–8204. Dusenbery *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 244.

No. 99–8205. Hernandez-Miranda *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8211. Gracia *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 99–8214. Sydnor *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 190 F. 3d 188.

No. 99–8216. Simpson *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 194 F. 3d 1321.

No. 99–8219. Adkins *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 196 F. 3d 1112.

No. 99–8221. Emerson *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 430 Mass. 378, 719 N. E. 2d 494.

No. 99–8223. Zepeda-Aguirre *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1334.

No. 99–8226. Wallace *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 744 So. 2d 459.

No. 99–8227. Torres *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 190 F. 3d 542.

No. 99–8234. McRae *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 504.

No. 99–8235. Moore *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 191 F. 3d 456.

No. 99–8238. Litten *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 438.

No. 99–8241. Bostedt *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 230 Wis. 2d 747, 604 N. W. 2d 34.

No. 99–8248. Harley *v.* United States. Ct. App. D. C. Certiorari denied.

No. 99–8256. Hames *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8266. Hutson *v.* Fanello, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 191 F. 3d 445.

No. 99–8273. Bell *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 261.

No. 99–8280. Felix-Martinez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–8281. Diaz *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 1239.

No. 99–8284. Guy *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 201 F. 3d 441.

No. 99–8293. Myers *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 248.

No. 99–8295. Byrd *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 744 So. 2d 996.

No. 99–8296. Lewis, aka Harris *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1329.

No. 99–8300. Borelli *v.* True, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 447.

No. 99–8304. Pena *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 429.

No. 99–8307. Burgess *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 286.

No. 99–8308. Benally *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 3d 649.

No. 99–8309. Watson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1307.

No. 99–8310. Brown *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 182 F. 3d 910.

No. 99–8313. Montoya *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 286.

No. 99–8316. MacDonald *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 196 F. 3d 1260.

No. 99–8325. Cabrera *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 262.

No. 99–8326. Belcher *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 437.

No. 99–8327. Bannerman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 503.

No. 99–8328. Criscione *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 201 F. 3d 445.

No. 99–8331. Carrillo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 279.

No. 99–8332. Allen *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 206.

No. 99–8333. Arroyo *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 195 F. 3d 54.

No. 99–8340. Palmer *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–8346. Vernon *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 3d 884.

No. 99–8370. Ridenbaugh *v.* Ohio. Ct. App. Ohio, Licking County. Certiorari denied.

No. 99–1000. ARMSTRONG *v.* UNITED STATES. C. A. 8th Cir. Motion of Arrowhead Counties Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 186 F. 3d 1055.

No. 99–1009. DEBAUCHE *v.* TRANI ET AL. C. A. 4th Cir. Motion of Appleseed Electoral Reform Law Project et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 191 F. 3d 499.

No. 99–1011. KNIGHT PUBLISHING CO., DBA THE CHARLOTTE OBSERVER, ET AL. *v.* PRESBYTERIAN HEALTH SERVICES CORP. Sup. Ct. N. C. Motions of News & Observer Publishing Co., Inc., and Reporters Committee for Freedom of the Press et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 350 N. C. 449, 515 S. E. 2d 675.

No. 99–1140. TALLAKSON ET AL. *v.* BAXTER HEALTHCARE CORP. ET AL. C. A. 7th Cir. Motion of respondents for leave to lodge Court of Appeals' appendix under seal granted. Motion of respondents for leave to file Rule 29.6 listing under seal granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 202 F. 3d 273.

No. 99–7718. SMITH *v.* AMOCO OIL CO. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 191 F. 3d 456.

*Rehearing Denied*

No. 99–819. HOWARD *v.* NEW YORK TIMES CO., 528 U. S. 1080;

No. 99–872. HILL *v.* KANSAS CITY AREA TRANSPORTATION AUTHORITY, 528 U. S. 1137;

No. 99–1023. KALAN *v.* BOCKHORST, EHRLICH & KAMINSKEE, 528 U. S. 1139;

No. 99–5191. GULLEY *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., 528 U. S. 890;

No. 99–6392. SMITH *v.* JOHNSON, WARDEN, 528 U. S. 1026;

No. 99–6641. LUKENS *v.* OREGON STATE OFFICE FOR SERVICES TO CHILDREN AND FAMILIES, 528 U. S. 1052;

No. 99–6659. WINSLOW *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 528 U. S. 1084;

No. 99–6680. CUOZZO *v.* WAYNICK ET AL., 528 U. S. 1085;

No. 99–6743. DeAngelis *v.* Widener University School of Law et al., 528 U. S. 1053;

No. 99–6768. Wilkins *v.* Oklahoma, 528 U. S. 1086;

No. 99–6783. Hemmerle *v.* Bakst, 528 U. S. 1087;

No. 99–6825. Canterbury *v.* West, Secretary of Veterans Affairs, 528 U. S. 1088;

No. 99–6939. Tibbs *v.* Corcoran, Warden, 528 U. S. 1120;

No. 99–6964. Larry *v.* Texas, 528 U. S. 1120;

No. 99–7051. Davage *v.* United States, 528 U. S. 1093;

No. 99–7119. Ports *v.* Dean, Superintendent, Lake Correctional Institution, et al., 528 U. S. 1140;

No. 99–7184. WuChang et al. *v.* City of Redwood City et al., 528 U. S. 1141;

No. 99–7285. Lerro *v.* Board of Review, Department of Labor, et al., 528 U. S. 1126;

No. 99–7350. Vaile *v.* Walter, Superintendent, Airway Heights Corrections Center, 528 U. S. 1142; and

No. 99–7512. In re LeGrande, 528 U. S. 1113. Petitions for rehearing denied.

No. 99–5682. Mack *v.* United States Postal Service, 528 U. S. 914. Motion for leave to file petition for rehearing denied.

## March 21, 2000

*Miscellaneous Order*

No. 99A783. Hampton, By and Through Pincus, as Next Friend *v.* Luebbers, Superintendent, Potosi Correctional Center. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied.

## March 22, 2000

*Miscellaneous Order*

No. 99A786. Bell, Warden *v.* Coe. Application to vacate stay of execution of sentence of death entered by the United States District Court for the Middle District of Tennessee on March 22, 2000, presented to Justice Stevens, and by him referred to the Court, denied.

*Certiorari Denied*

No. 99–8681 (99A767). Coe *v.* Tennessee. Sup. Ct. Tenn. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 17 S. W. 3d 193.

MARCH 24, 2000

*Miscellaneous Order*

No. 99M80. HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. *v.* CROMARTIE ET AL. Motion of appellees to expedite schedule for appeal denied.

MARCH 27, 2000

*Affirmed on Appeal*

No. 99–1212. LAROUCHE ET AL. *v.* FOWLER ET AL. Appeal from D. C. D. C. Motion of Democratic Party officials and members for leave to file a brief as *amici curiae* granted. Judgment affirmed. Reported below: 77 F. Supp. 2d 80.

*Certiorari Dismissed*

No. 99–8233. KIMBERLIN *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. D–2148. IN RE DISBARMENT OF STONE. William T. Stone, of Williamsburg, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2149. IN RE DISBARMENT OF RASKIN. Stephen L. Raskin, of South Miami, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2150. IN RE DISBARMENT OF KORONES. N. David Korones, of St. Petersburg, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2151. IN RE DISBARMENT OF TRAVIS. Robert L. Travis, Jr., of Tallahassee, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2152. In re Disbarment of Haley. Timothy S. Haley, of Caldwell, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 99M75. Castillo *v.* Alabama. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. 99–1396. Chandler et al. *v.* Harris, Secretary of State of Florida, et al. Appeal from D. C. S. D. Fla. Motion of appellants to expedite consideration of jurisdictional statement prior to May 8, 2000, denied.

No. 99–7817. In re Falcon. Petition for writ of habeas corpus denied.

No. 99–8249. In re Hewlett. Petition for writ of mandamus denied.

No. 99–7932. In re Webb. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Denied*

No. 99–879. Moghadam *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 175 F. 3d 1269.

No. 99–887. Richardson *v.* Reno, Attorney General, et al. C. A. 11th Cir. Certiorari denied. Reported below: 180 F. 3d 1311.

No. 99–898. City of Chicago et al. *v.* Shalala, Secretary of Health and Human Services, et al. C. A. 7th Cir. Certiorari denied. Reported below: 189 F. 3d 598.

No. 99–949. Dahlstrom *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 180 F. 3d 677.

No. 99–993. Arkansas *v.* Farm Credit Services of Central Arkansas et al. Sup. Ct. Ark. Certiorari denied. Reported below: 338 Ark. 322, 994 S. W. 2d 453.

No. 99–1045. Bear Lodge Multiple Use Assn. et al. *v.* Babbitt, Secretary of the Interior, et al. C. A. 10th Cir. Certiorari denied. Reported below: 175 F. 3d 814.

No. 99–1048. Kansas State University *v.* Innes et ux. C. A. 10th Cir. Certiorari denied. Reported below: 184 F. 3d 1275.

No. 99–1049. Datalect Computer Services, Ltd. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 215 F. 3d 1344.

No. 99–1062. Arizona *v.* Leyva et ux. Ct. App. Ariz. Certiorari denied. Reported below: 195 Ariz. 13, 985 P. 2d 498.

No. 99–1217. A–1 Ambulance Service, Inc. *v.* Melton et al. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1331.

No. 99–1218. Gangi Bros. Packing Co. et al. *v.* Cargill, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 1090.

No. 99–1220. Novecon, Ltd., et al. *v.* Bulgarian-American Enterprise Fund et al. C. A. D. C. Cir. Certiorari denied. Reported below: 190 F. 3d 556.

No. 99–1232. Grand Rapids Plastics, Inc. *v.* Lakian et al. C. A. 6th Cir. Certiorari denied. Reported below: 188 F. 3d 401.

No. 99–1236. Hydreclaim Corp. *v.* Process Control Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 190 F. 3d 1350.

No. 99–1242. Central West Virginia Development Corp. *v.* Fry. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1326.

No. 99–1245. Sherman *v.* American Cyanamid Co. C. A. 6th Cir. Certiorari denied. Reported below: 188 F. 3d 509.

No. 99–1256. Sequoyah County Rural Water District No. 7 *v.* Town of Muldrow et al. C. A. 10th Cir. Certiorari denied. Reported below: 191 F. 3d 1192.

No. 99–1270. Springer *v.* Hustler Magazine et al. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 258.

No. 99–1273. AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSN., INC., ET AL. *v.* UNITED STATES LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 197 F. 3d 631.

No. 99–1276. GREENE *v.* DOUGLAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1322.

No. 99–1280. FISHER *v.* MICHIGAN. Cir. Ct. Oakland County, Mich. Certiorari denied.

No. 99–1297. MENSAH *v.* ST. JOSEPH COUNTY FAMILY INDEPENDENCE AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 636.

No. 99–1298. WARE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 99–1300. COLEMAN *v.* STEWART ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 777 So. 2d 329.

No. 99–1302. TUCKNESS *v.* HENDERSON, POSTMASTER GENERAL, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 194 F. 3d 1321.

No. 99–1318. SIMMONS *v.* WETHERALL ET AL. Sup. Ct. Conn. Certiorari denied.

No. 99–1338. SMITH ET AL. *v.* HARRIS COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 198 F. 3d 241.

No. 99–1359. FERREIRA *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 133 Idaho 474, 988 P. 2d 700.

No. 99–1364. RAINY LAKE ONE STOP, INC., ET AL. *v.* MARIGOLD FOODS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 195 F. 3d 430.

No. 99–1409. CITY OF KANSAS CITY *v.* HARMON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 197 F. 3d 321.

No. 99–7489. PARKER *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 188 F. 3d 923.

No. 99–7537. FEAGIN, AKA AMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 190 F. 3d 543.

No. 99–7547. GAYDOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 99–7560. BROOKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 187 Ill. 2d 91, 718 N. E. 2d 88.

No. 99–7627. FRANKLIN *v.* GILMORE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 188 F. 3d 877.

No. 99–7802. DAVIS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 740 So. 2d 1135.

No. 99–7826. FEARS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 86 Ohio St. 3d 329, 715 N. E. 2d 136.

No. 99–7860. KLUMPP *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 99–7861. IBARRA *v.* TRUE. C. A. 11th Cir. Certiorari denied.

No. 99–7866. O'NEAL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 238 Ga. App. 446, 519 S. E. 2d 244.

No. 99–7869. ATKINS *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 99–7872. LINGAR *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 176 F. 3d 453.

No. 99–7873. MOJICA *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 262 App. Div. 2d 1002, 693 N. Y. S. 2d 365.

No. 99–7875. BRIGGS *v.* BOYS AND GIRLS CLUB OF CHARLOTTESVILLE/ALBEMARLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 187 F. 3d 628.

No. 99–7876. CHANDLER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–7877. SUGHRUE *v.* BUTLER, SUPERINTENDENT, POLK CORRECTIONAL INSTITUTE. C. A. 11th Cir. Certiorari denied. Reported below: 190 F. 3d 542.

No. 99–7879. Carter *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 99–7885. Grant *v.* Rivers. C. A. 6th Cir. Certiorari denied.

No. 99–7894. Davis *v.* Missouri et al. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 249.

No. 99–7898. Barnett *v.* Oklahoma et al. Ct. Crim. App. Okla. Certiorari denied.

No. 99–7900. Aguirre *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–7901. Brattain *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–7912. Jensen *v.* Lawseth et al. C. A. 9th Cir. Certiorari denied.

No. 99–7914. Lee *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–7927. McKire *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 192 F. 3d 131.

No. 99–7928. Williams *v.* Moore, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied. Reported below: 743 So. 2d 511.

No. 99–7935. Coates *v.* United States District Court for the Northern District of California. C. A. 9th Cir. Certiorari denied.

No. 99–7939. Mitchell *v.* Mantello, Superintendent, Coxsackie Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 99–7940. Yahweh *v.* Suthers, Executive Director, Colorado Department of Corrections. C. A. 10th Cir. Certiorari denied. Reported below: 188 F. 3d 520.

No. 99–7951. Kemnitz *v.* A. G. Edwards & Sons, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 165 F. 3d 14.

No. 99–7952. King *v.* Bell, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 190 F. 3d 479.

No. 99–7959. Anderson *v.* McClellan, Superintendent, Southport Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 172 F. 3d 37.

No. 99–7960. Stevens *v.* Texas (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 99–7964. Palaganas-Suarez *v.* Greene, District Director, Immigration and Naturalization Service, et al. C. A. 10th Cir. Certiorari denied. Reported below: 190 F. 3d 1135.

No. 99–7971. Palomino *v.* Stewart, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 99–7977. Gollehon *v.* Montana. Sup. Ct. Mont. Certiorari denied. Reported below: 296 Mont. 6, 986 P. 2d 395.

No. 99–7978. Espinoza Rodriguez *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–7988. Jones *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 99–8020. King *v.* Walter, Superintendent, Airway Heights Corrections Center. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 3d 647.

No. 99–8021. Marcum *v.* Oscar Mayer Foods Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 636.

No. 99–8040. Lattany *v.* Vaughn, Superintendent, State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied.

No. 99–8057. Crayon *v.* Roe, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 99–8070. Steele *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 99–8072. MENDOZA ET AL. *v.* PENNINGTON ET AL. Ct. App. Ga. Certiorari denied. Reported below: 239 Ga. App. 300, 519 S. E. 2d 715.

No. 99–8073. MENCHACA *v.* OLIVAREZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 194 F. 3d 1317.

No. 99–8098. KINGSTON *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 99–8110. ZAIN *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 207 W. Va. 54, 528 S. E. 2d 748.

No. 99–8132. WILLIAMS *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 73 Cal. App. 4th 710, 86 Cal. Rptr. 2d 665.

No. 99–8136. BERGET *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 188 F. 3d 518.

No. 99–8143. MONTANYA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8144. MICHELFELDER *v.* GAY & CHACKER, P. C. Super. Ct. Pa. Certiorari denied.

No. 99–8146. FRANCIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–8147. DIXON *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 99–8149. HAWKINS *v.* MAINE BUREAU OF INSURANCE. Sup. Jud. Ct. Me. Certiorari denied.

No. 99–8179. MCKINNEY *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 99–8201. TERRELL *v.* GILES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–8215. SNIPES *v.* COOK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 194 F. 3d 1309.

No. 99–8217. Oliver *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 191 F. 3d 449.

No. 99–8222. White *v.* Ebie. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 454.

No. 99–8258. Vandenburgh *v.* Moore, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 99–8259. Holguin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 166 F. 3d 1211.

No. 99–8269. Hartman *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8279. Elizondo Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 518.

No. 99–8301. Cameron *v.* Ferrara et al. Sup. Ct. Va. Certiorari denied.

No. 99–8323. Brumett *v.* Ohio. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 99–8343. Ramon-Perez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 286.

No. 99–8355. Hashisaki *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–8359. Ferrer *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 180 F. 3d 274.

No. 99–8362. Florez Hernandez *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 261.

No. 99–8363. Graves *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 203 F. 3d 827.

No. 99–8364. Haynes *v.* Illinois et al. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 273.

No. 99–8368. O'Toole *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–8371. OLVERA-TREJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 280.

No. 99–8372. MALGOZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–8377. GRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 189 F. 3d 480.

No. 99–8383. CHRISTMANN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 193 F. 3d 1023.

No. 99–8386. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 255.

No. 99–8390. GRIFFIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 194 F. 3d 808.

No. 99–8391. HARRISON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 247.

No. 99–8392. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 870.

No. 99–8398. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 199 F. 3d 416.

No. 99–8402. PASCHALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 523.

No. 99–8405. CLARK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 210 F. 3d 376.

No. 99–8410. WEBB *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 879.

No. 99–8415. RODRIGUEZ-MATOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 188 F. 3d 1300.

No. 99–8416. DOWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 3d 1342.

No. 99–8417. RYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 99–8418. FIORANI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 504.

No. 99–8430. Browne *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 247.

No. 99–8431. Zapata *v.* Purdy, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1116.

No. 99–8434. Chambers *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 197 F. 3d 465.

No. 99–8443. Rosas-Davila *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 462.

No. 99–8448. Williams *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1307.

No. 99–697. Lambert et ux. *v.* City and County of San Francisco et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

Justice Scalia, with whom Justice Kennedy and Justice Thomas join, dissenting.

Petitioners Claude and Micheline Lambert own the Cornell Hotel in San Francisco. The hotel has 24 residential units and 34 tourist units. After experiencing difficulty renting the hotel's residential units, petitioners applied to the San Francisco Planning Commission for a conditional use permit to convert those units to tourist use.* That request implicated two bodies of San Francisco's land-use law: the Planning Code and the Residential Hotel Unit Conversion and Demolition Ordinance (HCO). The Planning Code provides that a tourist hotel may not be "significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." S. F. Planning Code, Art. 1.7, § 178(c) (2000). The HCO prohibits the issuance of a permit for the conversion of units from residential to tourist use unless the proprietor agrees to provide either one-to-one replacement for those units or to pay a portion of the replacement costs. See S. F. Admin. Code, ch. 41, § 41.13 (2000).

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*When petitioners first sought to convert their residential units to tourist use, the hotel contained 31 residential units. Petitioners were successful, however, in convincing the San Francisco Board of Permit Appeals to reclassify seven of those as tourist units, producing the hotel's configuration noted in the text.

Pursuant to the HCO, the city obtained two appraisals of the replacement costs for the units petitioners wished to convert. See 67 Cal. Rptr. 2d 562, 570 (1997) (Strankman, P. J., dissenting). The first appraisal was $488,584 and the second was $612,887; the city settled on $600,000. See *ibid.* Petitioners, however, offered only $100,000. See *ibid.* After the Planning Commission denied the permit application, petitioners brought the present suit. They contended that the replacement fee is unconstitutional under this Court's decisions in *Nollan* v. *California Coastal Comm'n,* 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard,* 512 U. S. 374 (1994), which held that a burden imposed as a condition of permit approval must be related to the public harm that would justify denying the permit, and must be roughly proportional to what is needed to eliminate that harm. The California Court of Appeal affirmed the trial court's rejection of petitioners' claim. It held that the HCO played no part in the commission's decision, and therefore "San Francisco did not demand anything from [petitioners] as a condition of a use permit." 67 Cal. Rptr. 2d, at 569. Instead, the court maintained, the commission relied solely on the Planning Code and, basing its decision upon such traditional zoning concerns as compatibility with surrounding development, effect on traffic patterns, and availability of housing stock, "simply denied the permit outright." *Ibid.* Because, the court continued, "neither a property right nor money was in fact taken from [petitioners], there [was] no reason to determine if a taking would have occurred had [petitioners] been required to pay $600,000 as a condition of a use permit, and thus there [was] nothing requiring review under" *Nollan* and *Dolan.* 67 Cal. Rptr. 2d, at 569.

The record belies the Court of Appeal's claim that the commission ignored petitioners' refusal to meet its demand for a $600,000 payment. After acknowledging petitioners' offer of $100,000, the commission compared this figure with the amounts offered by two other hotels that had successfully requested similar conversions. 1 Appellants' App. in No. A076116 (Cal. Ct. App.), pp. 100, 102. It noted that in those two applications, the fee amounted to $10,000 and $15,000 per room, respectively. See *id.,* at 102. (The fee in petitioners' case, by contrast, amounted to only $3,226 per room. See 67 Cal. Rptr. 2d, at 571.) The commission then found that petitioners' application was "not comparable to those previously granted . . . ," because petitioners "failed to demonstrate that the amount offered" was "sufficient to mitigate the loss of housing stock." 1 Appellants' App., at 102. It is simply and obviously not true that the commission ignored petitioners' refusal to satisfy its fee demand.

The Court of Appeal itself, after asserting that "San Francisco did not demand anything" from petitioners, 67 Cal. Rptr. 2d, at 569, in the next breath found it "somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood *might have been overcome* by payment of [a] significant sum of money," *ibid.* (emphasis added). This observation makes no sense, of course, unless the court concluded from the record that the commission might have rendered a different decision if petitioners had been more generous. It sought to evade the natural consequence of that conclusion with the following unelaborated assertion: "That the Planning Commission *might have granted the permit* upon payment of $600,000 does not make its refusal to issue the permit into a taking." *Ibid.* (emphasis added).

There are three possible readings of the Court of Appeal's opinion. First, and most obviously, one might take at face value the court's factual finding that the fee played *no* role in the decision. That would be a gross distortion of the record.

Secondly, one might ignore the court's initial see-no-evil disclaimer, and assume that it accepted what the record undeniably showed, that petitioners' refusal to meet the fee demand was a motivating force behind the commission's decision. On that assumption, the court's refusal to apply *Nollan* and *Dolan* might be thought to rest upon its determination that that factor was irrelevant, since the commission *also* relied upon ordinary criteria under the Planning Code. But it is *always* the case that if the permit applicant does not yield to the extortionate demand, the *ordinary* criteria will be invoked to deny his permit. If indeed unjustified denial can constitute a taking (the question presented by the third basis for the decision, discussed below), *Nollan* and *Dolan* can surely not be evaded by simply adding boilerplate "ordinary criteria" language to the denial. The increasing complexity of land-use permitting processes, and of the criteria by which permit applications are judged, makes an "ordinary criteria" claim almost always plausible. When there is uncontested evidence of a demand for money or other property—and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish *either* (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met. Cf. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977). The record (and the Court of Appeal's opinion) make clear that the latter cannot be established here.

Finally, and still on the assumption that the Court of Appeal acknowledged that petitioners' failure to accede to the fee demand was a motivating factor in the commission's denial, the court's refusal to apply *Nollan* and *Dolan* might rest upon the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unlawful condition is not met. See Cal. Rptr. 2d, at 569 (Strankman, P. J., dissenting) (characterizing the majority's opinion in this fashion). From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process "'an out-and-out plan of extortion,'" *Nollan*, 483 U. S., at 837 (quoting *J. E. D. Associates, Inc.* v. *Atkinson*, 121 N. H. 581, 584, 432 A. 2d 12, 14–15 (1981)). There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference. It is undeniable, on the other hand, that the subject of any supposed taking in the present case is far from clear. Whereas in *Nollan* there was arguably a completed taking of an easement (the homeowner had completed construction that had been conditioned upon conveyance of the easement), and in *Dolan* there was at least a threatened taking of an easement (if the landowner *had* gone ahead with her contemplated expansion plans the easement would have attached), in the present case there is neither a taking nor a threatened taking of any money. If petitioners go ahead with the conversion of their apartments, the city will not sue for $600,000 imposed as a condition of the conversion; it will sue to enjoin and punish a conversion that has been prohibited.

The first two of the conceivable bases for the Court of Appeal's decision are so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards set forth by this tribunal. There is reason to believe that this may be more than a local and isolated phenomenon. See, *e. g.*, Delaney, Development Agreements: The Road from Prohibition to "Let's Make a Deal!" 25 Urb. Law. 49, 52 (1993) ("In addition to anti-development attitudes and vesting problems, property owners and developers are confronting decisions of state courts which either ignore or do not follow the 'essential nexus' standard set forth in *Nollan* v. *California Coastal Comm'n* to validate development exactions" (footnote omitted)); M. Berger, Recent Developments in the Law of Inverse Condemnation, Q203 ALI–ABA Video Law Review Study 1, 4 (1991) ("Last year, we noted that the California appellate courts had reacted to the Supreme Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles,* (1987) 482 U. S. 304 and *Nollan* v. *California Coastal Comm'n* (1987) 483 U. S. 825 by seeking ways to evade their evident mandate, either procedurally or substantively"). Were they the only arguable bases for the decision I would favor summary reversal, and remand for conduct of the *Nollan-Dolan* analysis. The third basis, however, is at least a plausible one, and raises a question that will doubtless be presented in many cases. Though I am unaware of a conflict of authority on the precise point, the other grounds upon which the court relied entitle this case to our attention, and should overcome our usual preference for cases that present actual conflicts. I would therefore grant certiorari and schedule the case for argument.

No. 99–1081. TOWN OF MULDROW ET AL. *v.* SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7. C. A. 10th Cir. Motions of Alabama Water and Wastewater Institute et al., Water Works and Sewer Board of Birmingham, Texas Municipal League et al., City of Broken Arrow et al., and Greenville Utilities Commission for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 191 F. 3d 1192.

No. 99–1324. JAY *v.* AT&T CORP. ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 187 F. 3d 641.

*Rehearing Denied*

No. 98–9959. GULLEY *v.* CIRCUIT COURT FOR MILWAUKEE COUNTY, 528 U. S. 862;

No. 99–7028. FISHER *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, 528 U. S. 1092;

No. 99–7375. CHAMPION *v.* UNITED STATES, 528 U. S. 1128; and

No. 99–7789. VAN HOORELBEKE *v.* UNITED STATES, 528 U. S. 1179. Petitions for rehearing denied.

### MARCH 28, 2000

*Dismissal Under Rule 46*

No. 99–1274. ARLINGTON COUNTY SCHOOL BOARD ET AL. *v.* TUTTLE ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 195 F. 3d 698.

### APRIL 3, 2000

*Certiorari Granted—Vacated and Remanded*

No. 99–5436. WILLIAMS *v.* WISCONSIN. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *J. L.*, *ante*, p. 266. Reported below: 225 Wis. 2d 159, 591 N. W. 2d 823.

No. 99–7592. MORRISON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Florida* v. *J. L.*, *ante*, p. 266.

*Certiorari Dismissed*

No. 99–7970. SYVERTSON *v.* FARGO FORUM ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 99–8025. BIERLEY *v.* CONNELLY, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, ERIE COUNTY, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 185 F. 3d 861.

*Miscellaneous Orders*

No. D–2153. IN RE DISBARMENT OF SCALF. William M. Scalf, of Corbin, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2154. In re Disbarment of Adams. James Llewellyn Adams, of Breckenridge, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2156. In re Disbarment of Mitchell. Ekita Leverette Mitchell, of Silver Spring, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 99M76. Payne *v.* Jennings et al.;
No. 99M78. Partridge *v.* Department of Defense; and
No. 99M79. Noriega-Perez *v.* United States. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 99–224. Miller, Superintendent, Pendleton Correctional Facility, et al. *v.* French et al. C. A. 7th Cir. [Certiorari granted *sub nom. Duckworth* v. *French,* 528 U. S. 1045]; and
No. 99–582. United States *v.* French et al. C. A. 7th Cir. [Certiorari granted, 528 U. S. 1045.] Motion of petitioners for divided argument granted, and the time is divided as follows: 20 minutes for the Solicitor General, 20 minutes for petitioners Miller et al., and 20 minutes for respondents.

No. 99–387. Raleigh, Chapter 7 Trustee for the Estate of Stoecker *v.* Illinois Department of Revenue. C. A. 7th Cir. [Certiorari granted, 528 U. S. 1068.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–579. Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust, et al. *v.* Salomon Smith Barney Inc. et al. C. A. 7th Cir. [Certiorari granted, 528 U. S. 1068.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 99–830. Stenberg, Attorney General of Nebraska, et al. *v.* Carhart. C. A. 8th Cir. [Certiorari granted, 528 U. S.

1110.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 99–5525. DICKERSON *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 528 U. S. 1045.] Motion of the Solicitor General for divided argument granted.

No. 99–8016. ABRAM *v.* LAXTON ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 24, 2000, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 99–8516. IN RE TOWNE; and
No. 99–8593. IN RE SILAS. Petitions for writs of habeas corpus denied.

No. 99–8353. IN RE DEPREE. Petition for writ of mandamus denied.

No. 99–7987. IN RE LUKENS. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 99–1235. GREEN TREE FINANCIAL CORP.-ALABAMA ET AL. *v.* RANDOLPH. C. A. 11th Cir. Certiorari granted. Reported below: 178 F. 3d 1149.

No. 99–603. LEGAL SERVICES CORPORATION *v.* VELAZQUEZ ET AL.; and
No. 99–960. UNITED STATES *v.* VELAZQUEZ ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 164 F. 3d 757.

*Certiorari Denied*

No. 98–994. SAMMY'S OF MOBILE, LTD., ET AL. *v.* CITY OF MOBILE. C. A. 11th Cir. Certiorari denied. Reported below: 140 F. 3d 993.

No. 98–1935. DEJA VU OF NASHVILLE, INC., ET AL. *v.* METROPOLITAN GOVERNMENT OF NASHVILLE ET AL.; and
No. 98–2021. D. L. S., INC., DBA DIAMONDS AND LACE SHOWBAR, ET AL. *v.* CITY OF CHATTANOOGA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 172 F. 3d 873.

No. 98–2053. COLACURCIO ET AL. *v.* CITY OF KENT. C. A. 9th Cir. Certiorari denied. Reported below: 163 F. 3d 545.

No. 99–220. DCR, INC., ET AL. *v.* PIERCE COUNTY. Ct. App. Wash. Certiorari denied. Reported below: 92 Wash. App. 660, 964 P. 2d 380.

No. 99–356. CITY OF JACKSONVILLE *v.* LADY J. LINGERIE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 176 F. 3d 1358.

No. 99–881. GOOD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 189 F. 3d 1355.

No. 99–941. FORTE *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 194 F. 3d 1338.

No. 99–1089. DEW ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 192 F. 3d 366.

No. 99–1110. MAFRIGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 189 F. 3d 466.

No. 99–1123. CUTSHALL *v.* SUNDQUIST, GOVERNOR OF TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 193 F. 3d 466.

No. 99–1134. MELKA MARINE, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 187 F. 3d 1370.

No. 99–1143. SOFAER *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 728 A. 2d 625.

No. 99–1210. NOORILY ET AL. *v.* THOMAS & BETTS CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 188 F. 3d 153.

No. 99–1247. STIMPSON *v.* CITY OF TUSCALOOSA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 186 F. 3d 1328.

No. 99–1250. HARRIS ET UX. *v.* JACKSON ROAD CO. Sup. Ct. Ohio. Certiorari denied. Reported below: 86 Ohio St. 3d 203, 714 N. E. 2d 377.

No. 99–1275. SCHEIDLY *v.* TRAVELERS INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 191 F. 3d 445.

No. 99–1287. MITSUBISHI ELECTRIC CORP. *v.* AMPEX CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 190 F. 3d 1300.

No. 99–1289. UNITED STATES EX REL. AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC. *v.* THE LIMITED, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 190 F. 3d 729.

No. 99–1291. JF HOTEL MANAGEMENT *v.* FLYNN. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 261.

No. 99–1296. MURRAY *v.* SMILTNEEK. 95B Jud. Dist. Ct., Dickinson County, Mich. Certiorari denied.

No. 99–1304. ALLEN-SESKER ET AL. *v.* BELL ATLANTIC GLOBAL WIRELESS, INC., T/A CHESAPEAKE DIRECTORY SALES CO., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 435.

No. 99–1306. HERSHFIELD *v.* BOARD OF ZONING APPEALS, KING GEORGE COUNTY. Sup. Ct. Va. Certiorari denied.

No. 99–1309. CHANDLER *v.* CHANDLER ET AL. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 991 S. W. 2d 367.

No. 99–1317. MUKA *v.* RUTHERFORD INSTITUTE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 F. 3d 174.

No. 99–1333. DISTELRATH, CHIEF OF POLICE, WEST COVINA POLICE DEPARTMENT, ET AL. *v.* HONEY. C. A. 9th Cir. Certiorari denied. Reported below: 195 F. 3d 531.

No. 99–1335. SECURITY FINANCE CORP. ET AL. *v.* CLARK, ACTING ADMINISTRATOR, OKLAHOMA DEPARTMENT OF CONSUMER CREDIT, ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 990 P. 2d 845.

No. 99–1337. DOUTHITT *v.* MAY DEPARTMENT STORES, DBA FAMOUS BARR. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 303 Ill. App. 3d 1124, 747 N. E. 2d 1117.

No. 99–1339. BURKHART *v.* QUILICI. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 99–1356. Levy et ux. *v.* Swift Transportation Co. et al. C. A. 10th Cir. Certiorari denied. Reported below: 194 F. 3d 1320.

No. 99–1373. Fowler *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 339 Ark. 207, 5 S. W. 3d 10.

No. 99–1381. Kobayashi *v.* Spencer et al. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 278.

No. 99–1385. Lodermeier *v.* Dooley, Warden. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 250.

No. 99–1398. Malowney *v.* Butterworth, Attorney General of Florida. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 1342.

No. 99–1402. Robinson et al. *v.* District of Columbia Board of Zoning Adjustment et al. Ct. App. D. C. Certiorari denied.

No. 99–1432. Ortiz-Miranda et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 166 F. 3d 19.

No. 99–1433. Colon-Munoz *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 192 F. 3d 210.

No. 99–1452. Daniele *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 249.

No. 99–1454. Savage *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 454.

No. 99–1458. Glassman et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 253.

No. 99–1461. Blakeney *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 451.

No. 99–1467. Brown *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 201 F. 3d 440.

No. 99–7177. Ward *v.* Trent, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 505.

No. 99–7205. MEDINA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 181 F. 3d 1078.

No. 99–7398. CERVANTES-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 515.

No. 99–7406. WILLIAMS *v.* CITY OF ATLANTA. C. A. 11th Cir. Certiorari denied. Reported below: 189 F. 3d 486.

No. 99–7545. HINTON, AKA BALDWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 461.

No. 99–7620. KALUNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 192 F. 3d 1188.

No. 99–7825. SOLIS SOSA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 198 F. 3d 240.

No. 99–7962. PATEL *v.* PMA INSURANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 182 F. 3d 904.

No. 99–7963. OATES *v.* ENGLUND ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 194 F. 3d 1321.

No. 99–7969. PFEIL *v.* EVERETT, WARDEN. Sup. Ct. Wyo. Certiorari denied.

No. 99–7972. SCHRODER *v.* BIENVENU ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 478.

No. 99–7973. SAMUELS *v.* HENRY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 99–7974. WORDLAW *v.* BOWLES, SHERIFF, DALLAS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1337.

No. 99–7982. TAYLOR *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 99–7983. BROADWAY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 753 So. 2d 801.

No. 99–7986. CHAE HO LEE *v.* RAMIREZ-PALMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–7990. CHAMPION *v.* RIVERS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–7991. THOMAS-EL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–7992. SKETOE *v.* EXXON CO., USA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 188 F. 3d 596.

No. 99–7993. ROBINSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 761 So. 2d 269.

No. 99–7994. WOODBERRY *v.* DAY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–8004. FOSTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–8015. BELL *v.* NERO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 176 F. 3d 481.

No. 99–8018. SANCHEZ *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 99–8028. CASTRO *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 99–8029. KIPKIRWA *v.* SANTA CLARA COUNTY, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–8030. MEEKS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 576, 24 P. 3d 271.

No. 99–8031. KNIGHT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 99–8035. COBBIN *v.* SUTHERS, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 257.

No. 99–8036. COLEMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 3d 398.

No. 99–8039. BOLLING *v.* CIRCUIT COURT OF VIRGINIA, CITY OF RICHMOND. Sup. Ct. Va. Certiorari denied.

No. 99–8042. JOHNSTONE *v.* BAYER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 513.

No. 99–8046. COHEN *v.* BLANCHET ET AL. C. A. 2d Cir. Certiorari denied.

No. 99–8047. BURK *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 26 Kan. App. 2d —, 983 P. 2d 286.

No. 99–8048. ARRINGTON *v.* BROWARD COMMUNITY COLLEGE, SOUTH CAMPUS. C. A. 11th Cir. Certiorari denied. Reported below: 178 F. 3d 1303.

No. 99–8049. BUNNEY *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8053. WHITE *v.* DOWNES. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 454.

No. 99–8060. CAREY *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied.

No. 99–8061. COOK *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8063. COLLINS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8066. SAIYED *v.* WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 254.

No. 99–8084. TAYLOR *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 746 So. 2d 463.

No. 99–8086. BRYSON *v.* GIBSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 187 F. 3d 1193.

No. 99–8112. WOJTASZEK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 739 A. 2d 593.

No. 99–8122. OGUNDE *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 99–8141. SPAIN *v.* WEST, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 858.

No. 99–8163. DERDEN *v.* HARGETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 192 F. 3d 126.

No. 99–8193. GREEN *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 99–8195. DOBY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8197. HARRIMAN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8225. WESTFALL *v.* UNDERWOOD, GOVERNOR OF WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–8237. JORDAN *v.* HAUNANI-HENRY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1332.

No. 99–8272. WABASHA *v.* WEBER, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 99–8274. BROADES *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 99–8277. WILLIAMS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–8291. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 99–8297. CLAYTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 198 F. 3d 241.

No. 99–8298. ATRAQCHI ET UX. *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 51.

No. 99–8320. MUSTAFA *v.* ROBACZEWSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 817.

No. 99–8329. BROWN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 250 Conn. 611, 737 A. 2d 404.

No. 99–8358. GALLO *v.* UNITED STATES ATTORNEY'S OFFICE, EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 182 F. 3d 899.

No. 99–8366. HILL *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8393. ROANE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8397. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 99–8414. DIAZ *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 985 P. 2d 83.

No. 99–8423. MANGIARDI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 202 F. 3d 255.

No. 99–8424. JOINER *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8426. SPELLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 193 F. 3d 515.

No. 99–8439. RAU *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1327.

No. 99–8442. SNEAD *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 503.

No. 99–8452. ORTEGA-GOMEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 449.

No. 99–8453. BADGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–8454. Coleman *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 251 Conn. 249, 741 A. 2d 1.

No. 99–8455. Russo *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–8464. Meling *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 99–8475. Obodoagha *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 516.

No. 99–8476. Skyers *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 99–8480. Payne *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 99–8483. Seeley *v.* McCaughtry, Warden. C. A. 7th Cir. Certiorari denied.

No. 99–8487. Cowan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 196 F. 3d 646.

No. 99–8490. Bayless *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 116.

No. 99–8491. Bozon Pappa *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 522.

No. 99–8492. Maldonado-Olivas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1114.

No. 99–8494. King *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1306.

No. 99–8495. Nam Nhat Ngo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–8501. Liquori *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 516.

No. 99–8509. Mendoza-Iribe *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 742.

No. 99–8513. Turner *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 425.

No. 99–1046. SMITH *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to file petition for writ of certiorari under seal with redacted copies for the public granted. Certiorari denied. Reported below: 190 F. 3d 375.

No. 99–1074. SAMAROO *v.* AT&T MANAGEMENT PENSION PLAN. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 193 F. 3d 185.

No. 99–1272. INVESTORS GUARANTY FUND LTD. *v.* MORGAN STANLEY & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 199 F. 3d 1322.

No. 99–1292. UNITED STATES BAKERY, INC., DBA SNYDER'S BAKERY, INC. *v.* SCHNEIDER ET AL. Ct. App. Wash. Motion of American Bakers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 95 Wash. App. 399, 976 A. 2d 134.

*Rehearing Denied*

No. 99–6708. O'NEILL *v.* COHN, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, 528 U. S. 1085;
No. 99–6792. RELIFORD *v.* SOUTH CAROLINA, 528 U. S. 1087;
No. 99–6885. PAGANO *v.* MASSACHUSETTS, 528 U. S. 1089;
No. 99–7053. HOWELL *v.* HELMAN, WARDEN, 528 U. S. 1093;
No. 99–7054. VALENZUELA FLORES *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 528 U. S. 1122;
No. 99–7060. MCGUIRE *v.* ARKANSAS ET AL., 528 U. S. 1123;
No. 99–7180. STEVENS *v.* MICHIGAN, 528 U. S. 1164;
No. 99–7777. TRAPP *v.* SUPREME COURT OF WASHINGTON, 528 U. S. 1179; and
No. 99–7822. JIMENEZ *v.* UNITED STATES, 528 U. S. 1183. Petitions for rehearing denied.

APRIL 5, 2000

*Dismissals Under Rule 46*

No. 99–5. UNITED STATES *v.* MORRISON ET AL.; and

No. 99–29. Brzonkala *v.* Morrison et al. C. A. 4th Cir. [Certiorari granted, 527 U. S. 1068.] Writ of certiorari only as to Virginia Polytechnic Institute and State University and William Landsidle dismissed under this Court's Rule 46.1.

No. 99–1096. United States *v.* Reed. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.2. Reported below: 177 F. 3d 824.

April 13, 2000

*Certiorari Denied*

No. 99–9077 (99A843). Tarver *v.* Alabama. Sup. Ct. Ala. Application for stay of execution of sentence of death, presented to Justice Kennedy, and by him referred to the Court, denied. Certiorari denied.

April 17, 2000

*Certiorari Dismissed*

No. 99–8068. Saunders *v.* Kearney, Warden, et al. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 746 A. 2d 277.

No. 99–8096. Kukes *v.* California. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 99–8264. Delespine *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders**

No. D–2155. In re Disbarment or Other Discipline of Moore. Teddy I. Moore, of Flushing, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable

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*For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see, *post*, p. 1149; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1157; amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1181; and amendments to the Federal Rules of Evidence, see *post*, p. 1191.

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Dissenting statement by JUSTICE STEVENS, with whom JUSTICE BREYER joins.

In my opinion Teddy I. Moore should be reprimanded for his unprofessional conduct and also admonished that future misconduct of the same sort will be sanctioned more severely.

No. 99M81. KUTSCHKE *v.* COMMISSIONER OF SOCIAL SECURITY; and

No. 99M82. GREEN *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time under this Court's Rule 14.5 denied.

No. 99M83. PRIDE *v.* MOSES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 99–658. CASTILLO ET AL. *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 528 U. S. 1109.] Motion of petitioner Graeme Leonard Craddock for leave to proceed further herein *in forma pauperis* granted.

No. 99–696. AMERICAN GRAIN TRIMMERS, INC., ET AL. *v.* OFFICE OF WORKERS' COMPENSATION PROGRAMS ET AL., 528 U. S. 1187. Motion of respondent Marian Janich for attorney's fees denied without prejudice to filing in the United States Court of Appeals for the Seventh Circuit.

No. 99–7476. STEELE *v.* CALIFORNIA DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [528 U. S. 1148] denied.

No. 99–7492. ABIDEKUN *v.* DEPARTMENT OF EDUCATION. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [528 U. S. 1148] denied.

No. 99–8171. IN RE ROLAND;

No. 99–8683. IN RE CLAY; and

No. 99–8792. IN RE PATTERSON. Petitions for writs of habeas corpus denied.

No. 99–8151. IN RE FELDER;

No. 99–8278. In re Bardella;
No. 99–8305. In re Russel; and
No. 99–8338. In re delos Reyes. Petitions for writs of mandamus denied.

No. 99–8470. In re Nagy. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 99–7961. In re Scott. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 99–929. Cook *v.* Gralike et al. C. A. 8th Cir. Certiorari granted. Reported below: 191 F. 3d 911.

No. 99–1238. Artuz, Superintendent, Green Haven Correctional Facility *v.* Bennett. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 199 F. 3d 116.

No. 99–1240. Board of Trustees of the University of Alabama et al. *v.* Garrett et al. C. A. 11th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 193 F. 3d 1214.

*Certiorari Denied*

No. 99–971. Cherna *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 3d 403.

No. 99–977. Sebastian et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 185 F. 3d 1368.

No. 99–1014. Jones et al. *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–1029. Darby *v.* Ingalls Shipbuilding, Inc., et al. C. A. 5th Cir. Certiorari denied.

No. 99–1052. Verkin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 517.

No. 99–1133. Illinois *v.* Boyer. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 305 Ill. App. 3d 374, 713 N. E. 2d 655.

No. 99–1144. McDougal-Saddler *v.* Herman, Secretary of Labor. C. A. 3d Cir. Certiorari denied. Reported below: 184 F. 3d 207.

No. 99–1162. Abdullah et al. *v.* Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. Reported below: 184 F. 3d 158.

No. 99–1163. Ferrell et al. *v.* Cuomo, Secretary of Housing and Urban Development, et al. C. A. 7th Cir. Certiorari denied. Reported below: 186 F. 3d 805.

No. 99–1169. New Prime, dba Prime, Inc., et al. *v.* Owner Operators Independent Drivers Assn., Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 192 F. 3d 778.

No. 99–1171. Greater New York Metropolitan Food Council, Inc., et al. *v.* Giuliani, Mayor of the City of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 195 F. 3d 100.

No. 99–1172. Federation of Advertising Industry Representatives, Inc. *v.* City of Chicago. C. A. 7th Cir. Certiorari denied. Reported below: 189 F. 3d 633.

No. 99–1173. Cecil *v.* National Labor Relations Board et al. C. A. 6th Cir. Certiorari denied. Reported below: 194 F. 3d 1311.

No. 99–1181. Zucker et al. *v.* Occidental Petroleum Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 192 F. 3d 1323.

No. 99–1183. Shultz *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 138 Wash. 2d 638, 980 P. 2d 1265.

No. 99–1192. Bullock *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 982 S. W. 2d 579.

No. 99–1196. Transamerica Assurance Co. et al. *v.* Tillery et al. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 259.

No. 99–1305. Elkay Manufacturing Co. *v.* Ebco Manufacturing Co. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 192 F. 3d 973.

No. 99–1313. LONGMAN ET AL. *v.* FOOD LION, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 197 F. 3d 675.

No. 99–1319. UNITED STATES EX REL. WEDDINGTON *v.* SCOTT & WHITE MEMORIAL HOSPITAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 202 F. 3d 264.

No. 99–1320. CAMPBELL *v.* SLETTEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 249.

No. 99–1328. DIMA CORP. *v.* TOWN OF HALLIE. C. A. 7th Cir. Certiorari denied. Reported below: 185 F. 3d 823.

No. 99–1329. GRAYSON, ADMINISTRATOR OF THE ESTATE OF COLLINS, DECEASED *v.* ROYER. C. A. 4th Cir. Certiorari denied. Reported below: 195 F. 3d 692.

No. 99–1334. FOREMAN ET AL. *v.* DALLAS COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 314.

No. 99–1336. JONES *v.* LINCOLN ELECTRIC CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 188 F. 3d 709.

No. 99–1340. WHELCHEL *v.* CITY OF COVINGTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 194 F. 3d 1324.

No. 99–1345. DILORETO *v.* BOARD OF EDUCATION, DOWNEY UNIFIED SCHOOL DISTRICT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 196 F. 3d 958.

No. 99–1346. KRIM ET AL. *v.* ABBOUD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 202 F. 3d 264.

No. 99–1348. BVR LIQUIDATING, INC., FKA BEAVER PRECISION PRODUCTS, INC., ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 190 F. 3d 768.

No. 99–1350. SOUDERS *v.* LUCERO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 196 F. 3d 1040.

No. 99–1352. BROWN *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 430.

No. 99–1354. MENDOZA *v.* BORDEN, INC. C. A. 11th Cir. Certiorari denied. Reported below: 195 F. 3d 1238.

No. 99–1358. GIBSON GUITAR CORP. *v.* MEC IMPORT HANDELSGESELLSCHAFT GMBH. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 245.

No. 99–1360. MELLON *v.* CASSIDY. C. A. 11th Cir. Certiorari denied. Reported below: 192 F. 3d 131.

No. 99–1362. KILLINO ET AL. *v.* RIVERSIDE SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 191 F. 3d 445.

No. 99–1363. CARR *v.* GATES HEALTH CARE PLAN. C. A. 7th Cir. Certiorari denied. Reported below: 195 F. 3d 292.

No. 99–1372. GOLD *v.* DALKON SHIELD CLAIMANTS TRUST. C. A. 2d Cir. Certiorari denied. Reported below: 189 F. 3d 460.

No. 99–1375. MCENROY *v.* ST. MEINRAD SCHOOL OF THEOLOGY ET AL. Ct. App. Ind. Certiorari denied. Reported below: 713 N. E. 2d 334.

No. 99–1376. SEDDIO *v.* MICHAELS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 99–1377. HUTCHINSON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATES OF HUTCHINSON ET AL., DECEASED *v.* SPANIERMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 190 F. 3d 815.

No. 99–1390. HAYDEN *v.* ARKANSAS. C. A. 8th Cir. Certiorari denied.

No. 99–1391. PACKARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 198 F. 3d 234.

No. 99–1392. TAMBOLLEO *v.* MAINE STATE HARNESS RACING COMMISSION ET AL. Sup. Jud. Ct. Me. Certiorari denied.

No. 99–1394. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 196 F. 3d 774.

No. 99–1404. MOORE *v.* CITY OF CALUMET CITY. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–1411. Van Sickle *v.* Ford Motor Co. et al. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 516.

No. 99–1414. Holmes et ux. *v.* Daybrook Fisheries, Inc. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 730 So. 2d 1006.

No. 99–1423. Stillo et ux. *v.* Illinois State Retirement Systems, Judges' Retirement System. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 305 Ill. App. 3d 1003, 714 N. E. 2d 11.

No. 99–1441. Gutenkauf et al. *v.* Maricopa County et al. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 277.

No. 99–1444. Brown *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 830.

No. 99–1446. McClellan *v.* Northern Trust Co. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–1448. Miller *v.* United States; and

No. 99–1518. Wohlleber *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 188 F. 3d 1312.

No. 99–1451. Guesman *v.* District Court of Nevada, Clark County (Nevada, Real Party in Interest). Sup. Ct. Nev. Certiorari denied.

No. 99–1463. Junior *v.* West Virginia et al. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 237.

No. 99–1469. Brost *v.* Illinois et al. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–1472. Renahan *v.* Allegheny Power System, dba Monongahela Power Co., et al. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1305.

No. 99–1487. Fidelity Warranty Services, Inc. *v.* Kidd. C. A. 11th Cir. Certiorari denied. Reported below: 196 F. 3d 1262.

No. 99–1491. Malladi *v.* West, Secretary of Veterans Affairs. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 524.

No. 99–1509. GARDNER *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 99–1532. HARTSEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 199 F. 3d 812.

No. 99–1535. SCHARRINGHAUSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 256.

No. 99–1540. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1353.

No. 99–7188. POLK ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 182 F. 3d 919.

No. 99–7316. MENDEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 986 P. 2d 275.

No. 99–7472. LADD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 3 S. W. 3d 547.

No. 99–7511. STEPHNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 440.

No. 99–7780. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–7781. WISNIEWSKI *v.* CONTI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 3d 651.

No. 99–7839. CROOK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 238.

No. 99–8064. CHAIDEZ *v.* SCRIBNER ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–8076. JOHNSON *v.* ESSEX COUNTY HOSPITAL CENTER. Super. Ct. N. J., App. Div. Certiorari denied.

No. 99–8088. BOCELLI *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 202 F. 3d 253.

No. 99–8092. RILEY *v.* LOCK, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–8095. King *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 743 So. 2d 1097.

No. 99–8097. Mitchell *v.* Roach et al. C. A. D. C. Cir. Certiorari denied.

No. 99–8100. McDowall *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 99–8102. Muhammad *v.* Storr et al. C. A. 11th Cir. Certiorari denied. Reported below: 192 F. 3d 129.

No. 99–8104. Johnson *v.* Louisiana. C. A. 5th Cir. Certiorari denied.

No. 99–8106. Curtis *v.* Kemna, Superintendent, Crossroads Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 249.

No. 99–8108. Henderson *v.* Virginia Employment Commission et al. Sup. Ct. Va. Certiorari denied.

No. 99–8111. Washington *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–8113. Williams *v.* Pitcher, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–8114. Ware *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Certiorari denied. Reported below: 189 F. 3d 467.

No. 99–8123. Perry *v.* Files et al. C. A. 11th Cir. Certiorari denied.

No. 99–8128. A'Ku *v.* Motorola, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 272.

No. 99–8131. Skyers *v.* District of Columbia et al. C. A. D. C. Cir. Certiorari denied.

No. 99–8134. Walker *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8137. Coleman *v.* John Thomas Batts, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 188 F. 3d 506.

No. 99–8140. PEACHLUM *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 742 A. 2d 1149.

No. 99–8145. KREPS *v.* PESINA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 268.

No. 99–8150. FEATHERSTONE *v.* EUFINGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 268.

No. 99–8153. FLOURNOY *v.* MOSKOWITZ, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 99–8156. FORD *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8157. ELLIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 296 Ill. App. 3d 862, 696 N. E. 2d 1.

No. 99–8160. EVANS *v.* LOCK, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 193 F. 3d 1000.

No. 99–8161. GILL *v.* NEW YORK STATE BOARD OF LAW EXAMINERS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 257 App. Div. 2d 659, 682 N. Y. S. 2d 909.

No. 99–8170. STEELE *v.* MOORMAN. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 289.

No. 99–8192. GAINOR *v.* DOUGLAS COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 189 F. 3d 486.

No. 99–8196. FOYE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 335 S. C. 586, 518 S. E. 2d 265.

No. 99–8200. GRANT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–8207. SALCEDO GONZALES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 99–8208. HEBERT *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 716 So. 2d 63.

No. 99–8209. Davidson *v.* New Hampshire. C. A. 1st Cir. Certiorari denied.

No. 99–8210. Gaines *v.* Dallas County et al. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 519.

No. 99–8212. DeLeon *v.* Garcia, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 99–8218. Bargas *v.* Burns, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 179 F. 3d 1207.

No. 99–8220. Crawford *v.* Hill et al. C. A. 4th Cir. Certiorari denied. Reported below: 187 F. 3d 629.

No. 99–8228. Utley *v.* Bell, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 639.

No. 99–8229. Thomas *v.* Brown & Williamson Tobacco Corp. et al. C. A. 11th Cir. Certiorari denied.

No. 99–8230. VanDorsten *v.* LeCureux, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–8232. Murray *v.* Varner, Superintendent, State Correctional Institution at Retreat. C. A. 3d Cir. Certiorari denied.

No. 99–8236. Lewis *v.* Booker, Superintendent, Mississippi State Penitentiary. C. A. 5th Cir. Certiorari denied.

No. 99–8239. McGregor *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 99–8240. Cole *v.* City of Tampa, Florida. C. A. 11th Cir. Certiorari denied. Reported below: 194 F. 3d 1322.

No. 99–8250. Frazier *v.* Lea County District Court. Sup. Ct. N. M. Certiorari denied.

No. 99–8251. Hartline *v.* Stewart et al. C. A. 11th Cir. Certiorari denied.

No. 99–8252. Dixon *v.* Heard, Warden, et al. C. A. 2d Cir. Certiorari denied. Reported below: 182 F. 3d 899.

No. 99–8253. Daniels *v.* Galaza, Warden. C. A. 9th Cir. Certiorari denied.

No. 99–8254. HARRIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–8255. PIMENTEL FELIZ *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–8257. GULLEDGE *v.* DEES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8260. GROSSO *v.* ARTUZ, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8261. DUER *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 744 So. 2d 992.

No. 99–8262. HUDSON *v.* LAMARTINIERE. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 3d 819.

No. 99–8263. HARRELL *v.* MITCHEM, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8265. DIEHL *v.* NELSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 244.

No. 99–8268. ELLISON *v.* CYCMANICK, JUDGE, FLORIDA CIRCUIT COURT, 9TH JUDICIAL CIRCUIT, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8270. CHAMBERS *v.* COOK, DIRECTOR, OREGON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 201 F. 3d 443.

No. 99–8276. BLUE *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 741 So. 2d 1134.

No. 99–8283. FAUSTO *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 99–8286. DENICTOLIS ET AL. *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied.

No. 99–8289. PEABODY *v.* ZLAKET, CHIEF JUSTICE, SUPREME COURT OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 194 F. 3d 1317.

No. 99–8299. CAMERON *v.* SAMARRA, CHIEF OF POLICE, CITY OF ALEXANDRIA, ET AL. Sup. Ct. Va. Certiorari denied.

No. 99–8302. TAYLOR *v.* PAINTER, WARDEN. Cir. Ct. Berkeley County, W. Va. Certiorari denied.

No. 99–8303. WELLS *v.* PHILLIPS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–8306. SMITH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 99–8311. ADAMS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8336. MORAN RAMOS ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied.

No. 99–8339. RAJKOVIC *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied.

No. 99–8345. BARNES *v.* MALONEY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied.

No. 99–8347. WHITFORD *v.* BOGLINO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 276.

No. 99–8379. HUDSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–8384. BYERS *v.* MAHONEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 830.

No. 99–8388. CANCASSI *v.* ROBINSON. Super. Ct. N. J., App. Div. Certiorari denied.

No. 99–8399. NASIM *v.* MEISNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 3d 815.

No. 99–8403. SCOTT *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 51 M. J. 326.

No. 99–8404. COCHRAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 258 Va. 604, 521 S. E. 2d 287.

No. 99–8408. LEONE *v.* KERLEY ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8412. MARKAY *v.* FARMER, ATTORNEY GENERAL OF NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 99–8422. MILLER *v.* DAVIS-MORRELL, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 99–8446. TRUDEAU *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 99–8460. CINTRON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 351 N. C. 39, 519 S. E. 2d 523.

No. 99–8462. WILLIAMS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–8469. JACKSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 127 Md. App. 785.

No. 99–8478. POLK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 203 F. 3d 841.

No. 99–8510. MOORE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 793.

No. 99–8515. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1121.

No. 99–8517. WALTON *v.* TAYLOR, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 99–8518. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 467.

No. 99–8522. WESLOWSKI *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 854.

No. 99–8525. STEADMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 3d 643.

No. 99–8529. BENSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 265 App. Div. 2d 814, 697 N. Y. S. 2d 222.

No. 99–8530. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 190 F. 3d 542.

No. 99–8534. Clark *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 205 F. 3d 1354.

No. 99–8536. Parker *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 440.

No. 99–8537. Banks *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 3d 1342.

No. 99–8542. Bonowitz et al. *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 741 A. 2d 18.

No. 99–8544. Abram *v.* Department of Agriculture. C. A. 8th Cir. Certiorari denied.

No. 99–8547. Pulido *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8550. Lawson *v.* Ohio. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 99–8558. Peterson et ux. *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 306 Ill. App. 3d 1091, 715 N. E. 2d 1221.

No. 99–8559. Holland *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 195 F. 3d 415.

No. 99–8561. Eidson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 661.

No. 99–8562. Monaco *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 194 F. 3d 381 and 199 F. 3d 1324.

No. 99–8563. Beers *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 1297.

No. 99–8567. Fripp *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8568. Hall *v.* Calbone, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 182 F. 3d 913.

No. 99–8569. Garza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 366.

No. 99–8571. Hatala *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 191 F. 3d 449.

No. 99–8574. Haddad *v.* Michigan National Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 245.

No. 99–8575. Dike *v.* Wyoming. Sup. Ct. Wyo. Certiorari denied. Reported below: 990 P. 2d 1012.

No. 99–8578. Peacock *v.* Davis et ux. Sup. Ct. Idaho. Certiorari denied. Reported below: 133 Idaho 637, 991 P. 2d 362.

No. 99–8586. Goodwin *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 230 Wis. 2d 749, 604 N. W. 2d 35.

No. 99–8591. Callicutt *v.* Panola County Jail et al. C. A. 5th Cir. Certiorari denied. Reported below: 200 F. 3d 816.

No. 99–8596. Odom *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 199 F. 3d 321.

No. 99–8598. Williams *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 194 F. 3d 886.

No. 99–8600. Castillo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1115.

No. 99–8601. Chaidez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1352.

No. 99–8603. Young *v.* United States et al. C. A. D. C. Cir. Certiorari denied.

No. 99–8607. Stewart *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 99–8608. Sterling *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 260.

No. 99–8609. Pimentel *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 99–8612. Avila-Ramirez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1325.

No. 99–8613. Arestigueta *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 429.

No. 99–8617. Mora *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1330.

No. 99–8623. McNew *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1116.

No. 99–8624. Lisasuain *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 99–8628. Andrus *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1116.

No. 99–8632. Gardner *v.* Neal, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 199 F. 3d 915.

No. 99–8633. Gomez *v.* United States; and
No. 99–8658. Falquez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1120.

No. 99–8638. Doe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1330.

No. 99–8644. Madden *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1335.

No. 99–8647. Montes-Rangel *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1116.

No. 99–8649. DeCaro *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 99–8652. Gessa *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 99–8653. Green, aka Benns *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 181 F. 3d 92.

No. 99–8654. Hammond *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 99–8655. Fulton *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 99–8656. Farooq, aka Grinnell *v.* Russell, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–8657. Hallstead, aka Hallsted *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 189 F. 3d 468.

No. 99–8659. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 248.

No. 99–8661. WALKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 191 F. 3d 326.

No. 99–8663. REMACHE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–8666. BRYANT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 261.

No. 99–8676. ZEPEDA-CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1118.

No. 99–8677. MARTINEZ-RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1116.

No. 99–8682. BAISDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 523.

No. 99–8685. COLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 99–8688. ATWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 819.

No. 99–8691. CROSBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 F. 3d 1322.

No. 99–8692. CHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 99–8697. RUIZ-SUAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 280.

No. 99–8699. SOLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–8702. KELLUM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 213 F. 3d 302.

No. 99–8704. LOUGHRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 255.

No. 99–8705. JENNINGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1117.

No. 99–8706. Young *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 262.

No. 99–8707. Javier Cordoba *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 194 F. 3d 1053.

No. 99–8710. Stone *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–8711. Mendoza *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1329.

No. 99–8712. Kapaev *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 596.

No. 99–8714. Alcantar-Valenzuela *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 461.

No. 99–8715. Torres *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 203 F. 3d 840.

No. 99–8716. Woolfolk *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 900.

No. 99–8717. Taylor *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 196 F. 3d 854.

No. 99–8718. Valdez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 99–8720. Casiano *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 433.

No. 99–8721. Nixon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 209 F. 3d 719.

No. 99–8725. Bell *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1347.

No. 99–8741. Dixon *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 200 F. 3d 700.

No. 99–8742. Duran *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 1071.

No. 99–8745. Grant *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 204 F. 3d 1122.

No. 99–8746. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–8747. EARLS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–8748. GARCIA-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1353.

No. 99–8753. FILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 386.

No. 99–8754. GONZALEZ-MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1117.

No. 99–8755. HOOK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 195 F. 3d 299.

No. 99–8758. BURKHALTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 203 F. 3d 1096.

No. 99–8759. CADENA-GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1337.

No. 99–8774. DOMINGUEZ-CARMONA *v.* UNITED STATES; and
No. 99–8775. HERNANDEZ-VILLANUEVA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–1248. COOK GROUP, INC., ET AL. *v.* WILSON ET AL. C. A. 4th Cir. Motion of petitioners for leave to file sealed and trade secret materials from proceedings below under seal granted. Certiorari denied. Reported below: 199 F. 3d 1329.

No. 99–1368. CITY OF AUSTIN *v.* SOUTHWESTERN BELL VIDEO SERVICES, INC. C. A. 5th Cir. Motion of National Association of Telecommunications Officers and Advisors et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 193 F. 3d 309.

No. 99–1500. CALDERON, WARDEN *v.* MCDOWELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 197 F. 3d 1253.

*Rehearing Denied*

No. 99–913. Arctic Alaska Fisheries Corp. *v.* Hoddevik, 528 U. S. 1155;

No. 99–963. Bello *v.* University of Dayton School of Law et al., 528 U. S. 1156;

No. 99–1103. Mann *v.* City of Chicago et al., 528 U. S. 1160;

No. 99–1128. Tomeo *v.* Honeywell International, Inc., et al., 528 U. S. 1161;

No. 99–1138. Rosenbaum *v.* Rosenbaum, 528 U. S. 1161;

No. 99–1188. Garrison *v.* United States, 528 U. S. 1162;

No. 99–6905. Friend *v.* Reno, Attorney General, et al., 528 U. S. 1163;

No. 99–7062. Coleman *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, 528 U. S. 1164;

No. 99–7067. Peachlum *v.* Pennsylvania, 528 U. S. 1123;

No. 99–7165. Benn *v.* Louisiana, 528 U. S. 1140;

No. 99–7166. Brown *v.* Carey, Warden, et al., 528 U. S. 1141;

No. 99–7197. Mekalonis *v.* Workers' Compensation Appeal Board et al., 528 U. S. 1164;

No. 99–7200. Mills *v.* Kentucky, 528 U. S. 1164;

No. 99–7302. Siler *v.* Dillingham Ship Repair et al., 528 U. S. 1166;

No. 99–7360. Pratt *v.* Texas, 528 U. S. 1167;

No. 99–7405. In re Traylor, 528 U. S. 1152;

No. 99–7417. Pedraglio Loli *v.* Citibank, Inc., 528 U. S. 1168;

No. 99–7465. Mitchell *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, 528 U. S. 1170;

No. 99–7518. In re Siegel, 528 U. S. 1152;

No. 99–7532. Johnson *v.* Georgia, 528 U. S. 1172;

No. 99–7577. Bonner *v.* Department of the Air Force, 528 U. S. 1173;

No. 99–7625. Ioane et al. *v.* B. A. Properties, Inc., 528 U. S. 1174;

No. 99–7640. Harris *v.* County of Cook et al., 528 U. S. 1175;

No. 99–7654. McKinney *v.* State Employees' Retirement System, 528 U. S. 1175;

No. 99–7678. **Smith** *v.* **Cadwell**, 528 U. S. 1176;
No. 99–7694. **Bradford** *v.* **Barrett et al.**, 528 U. S. 1176;
No. 99–7706. **Tunstall** *v.* **Kavanagh, Warden, et al.**, *ante*, p. 1008;
No. 99–7707. **Akinkoye** *v.* **United States**, 528 U. S. 1177;
No. 99–7776. **Winsett** *v.* **West, Secretary of Veterans Affairs**, 528 U. S. 1193;
No. 99–7784. **Trice** *v.* **Sikes, Warden**, *ante*, p. 1025;
No. 99–7796. **Nagy** *v.* **Lappin**, 528 U. S. 1193;
No. 99–7842. **In re McSheffrey**, 528 U. S. 1152;
No. 99–7931. **Nagy** *v.* **Goldstein et al.**, 528 U. S. 1195; and
No. 99–7996. **Mosby** *v.* **United States**, 528 U. S. 1196. Petitions for rehearing denied.

## April 18, 2000

### *Certiorari Denied*

No. 99–9127 (99A859). **Coe** *v.* **Bell, Warden.** C. A. 6th Cir. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Certiorari denied. Reported below: 209 F. 3d 815.

### *Rehearing Denied*

No. 99–8681 (99A851). **Coe** *v.* **Tennessee**, *ante*, p. 1034. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Petition for rehearing denied.

## April 24, 2000

### *Affirmed on Appeal*

No. 99–1396. **Chandler et al.** *v.* **Harris, Secretary of State of Florida, et al.** Affirmed on appeal from D. C. S. D. Fla. Reported below: 88 F. Supp. 2d 1351.

### *Certiorari Granted—Vacated and Remanded*

No. 99–1401. **Hopkins, Warden** *v.* **Newman.** C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williams* v. *Taylor*, *ante*, p. 362. Reported below: 192 F. 3d 1132.

No. 99–5670. COLEMAN *v.* INDIANA. Sup. Ct. Ind. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williams* v. *Taylor, ante,* p. 362. Reported below: 703 N. E. 2d 1022.

No. 99–6862. THOMAS *v.* EARLEY, ATTORNEY GENERAL OF VIRGINIA, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Williams* v. *Taylor, ante,* p. 362. Reported below: 182 F. 3d 909.

*Miscellaneous Orders*

No. D–2141. IN RE DISBARMENT OF MCGILL. Disbarment entered. [For earlier order herein, see 528 U. S. 1150.]

No. D–2142. IN RE DISBARMENT OF GLAZER. Disbarment entered. [For earlier order herein, see 528 U. S. 1150.]

No. D–2144. IN RE DISBARMENT OF BERMAN. Disbarment entered. [For earlier order herein, see 528 U. S. 1150.]

No. D–2145. IN RE DISBARMENT OF MAININI. Disbarment entered. [For earlier order herein, see 528 U. S. 1150.]

No. D–2157. IN RE DISBARMENT OF BAKER. Charles Carter Baker, Jr., of Nashville, Tenn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2158. IN RE DISBARMENT OF FRESE. Eugene M. Frese, of Minersville, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2159. IN RE DISBARMENT OF BLACK. Geoffrey Scott Black, of Hampstead, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 99–658. CASTILLO ET AL. *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 528 U. S. 1109.] Motion for appointment of counsel granted, and it is ordered that Stanley Rentz, Esq., of Waco, Tex., be appointed to serve as counsel for petitioner Graeme Leonard Craddock in this case. Request for expenses and attorney's fees denied without prejudice.

No. 99–830. STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL. *v.* CARHART. C. A. 8th Cir. [Certiorari granted, 528 U. S. 1110.] Motion of Rutherford Institute for leave to file a brief as *amicus curiae* granted.

No. 99–8861. IN RE DEVORE;
No. 99–8869. IN RE DUMORNAY; and
No. 99–8918. IN RE JONES. Petitions for writs of habeas corpus denied.

*Certiorari Granted*

No. 99–7504. LOPEZ *v.* DAVIS, WARDEN, ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 186 F. 3d 1092.

*Certiorari Denied*

No. 98–9563. ASHFORD *v.* GILMORE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 167 F. 3d 1130.

No. 98–9840. BUI *v.* DIPAOLO, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 170 F. 3d 232.

No. 99–538. BOCK, ADMINISTRATOR OF THE ESTATE OF BOCK, DECEASED *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. C. A. 8th Cir. Certiorari denied. Reported below: 181 F. 3d 920.

No. 99–863. PRINCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 187 F. 3d 632.

No. 99–1040. PORT OF PORTLAND *v.* RONNE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 192 F. 3d 933.

No. 99–1179. POWER ENGINEERING CO. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 191 F. 3d 1224.

No. 99–1294. Foster, Superintendent of Banking and Administrator of Electronic Transfer Funds, Iowa Division of Banking, Iowa Department of Commerce *v.* Bank One, Utah, et al. C. A. 8th Cir. Certiorari denied. Reported below: 190 F. 3d 844.

No. 99–1330. Edmonds, Appearing as Tutrix of Her Minor Son, Bell *v.* Louisiana Department of Public Safety and Corrections et al. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 732 So. 2d 645.

No. 99–1343. Moenning *v.* Illinois Commerce Commission et al. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–1386. Qualls et al. *v.* City of Detroit et al. Ct. App. Mich. Certiorari denied.

No. 99–1387. Langlie *v.* Onan Corp. C. A. 8th Cir. Certiorari denied. Reported below: 192 F. 3d 1137.

No. 99–1395. Motley *v.* New Jersey State Police et al. C. A. 3d Cir. Certiorari denied. Reported below: 196 F. 3d 160.

No. 99–1397. CBT Group PLC et al. *v.* San Mateo County Superior Court. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–1406. Joytime Distributors & Amusement Co., Inc. *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 338 S. C. 634, 528 S. E. 2d 647.

No. 99–1410. First Mount Vernon, I. L. A. *v.* Prince George's County. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1304.

No. 99–1412. Cherokee Corporation of Linden, Virginia, Inc. *v.* Capital Skiing Corp. C. A. 4th Cir. Certiorari denied. Reported below: 191 F. 3d 447.

No. 99–1420. Ellis et al. *v.* Washington County et al. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 225.

No. 99–1435. Graves *v.* Boone, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 447.

No. 99–1436. Lin *v.* Lin (two judgments). Ct. App. N. C. Certiorari denied.

No. 99–1445. Speth *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 6 S. W. 3d 530.

No. 99–1447. Jones *v.* Frank et al. C. A. 3d Cir. Certiorari denied. Reported below: 202 F. 3d 254.

No. 99–1455. Atwell *v.* Atwell. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 730 So. 2d 858.

No. 99–1459. DePluzer *v.* Illinois et al. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 272.

No. 99–1460. Watts *v.* Network Solutions, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 276.

No. 99–1492. Garrison *v.* City of Wichita Falls et al. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1114.

No. 99–1513. In re Kavalaris. Sup. Ct. Cal. Certiorari denied.

No. 99–1525. Mizani, aka Slater *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 261.

No. 99–1531. Hyland *v.* Clinton, President of the United States. C. A. 6th Cir. Certiorari denied. Reported below: 208 F. 3d 213.

No. 99–5793. Harrison *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 707 N. E. 2d 767.

No. 99–6035. Taylor *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 190 F. 3d 538.

No. 99–6199. Colvin-El *v.* Nuth, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 205 F. 3d 1332.

No. 99–6738. Vann *v.* Small, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 3d 650.

No. 99–7299. White *v.* United States; and
No. 99–7523. White et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1307.

No. 99–7407. Daniels *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 187 Ill. 2d 301, 718 N. E. 2d 149.

No. 99–7487. SALAZAR-OLIVARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 179 F. 3d 228.

No. 99–7588. JONES *v.* APFEL, COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 190 F. 3d 1224.

No. 99–7594. BUSS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 187 Ill. 2d 144, 718 N. E. 2d 1.

No. 99–7623. NIELSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 187 Ill. 2d 271, 718 N. E. 2d 131.

No. 99–7808. FALSETTA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 21 Cal. 4th 903, 986 P. 2d 182.

No. 99–7863. POSPISIL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 186 F. 3d 1023.

No. 99–7878. SANCHEZ *v.* SCHOMIG, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 189 F. 3d 619.

No. 99–7920. DUNAWAY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 746 So. 2d 1042.

No. 99–8317. MURPHY *v.* CITY OF SMITHVILLE, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 198 F. 3d 246.

No. 99–8318. LATORRE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 742 A. 2d 1146.

No. 99–8319. JOHNSON *v.* JEFFERSON. Ct. App. D. C. Certiorari denied.

No. 99–8334. TRICE *v.* MCNEAL. C. A. 11th Cir. Certiorari denied.

No. 99–8337. RIVAS SUNIGA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–8341. ROGERS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 99–8342. SIMMONS *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–8344. TOWNSEND *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 99–8349. WINGATE *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 99–8350. WILSON *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 99–8354. DAVIS *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 99–8356. GANN *v.* ALABAMA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8357. GEARY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 79, 977 P. 2d 344.

No. 99–8360. GREENE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 139 Wash. 2d 64, 984 P. 2d 1024.

No. 99–8365. FIELDS *v.* JACKSON. Sup. Ct. Va. Certiorari denied.

No. 99–8367. HOGUE *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 99–8369. ROCHON *v.* EXXON CORP. C. A. 5th Cir. Certiorari denied. Reported below: 203 F. 3d 827.

No. 99–8373. JOHNSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8374. GARCIA LARRINAGA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 99–8375. MCWEENEY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 156 Ore. App. 397, 972 P. 2d 1228.

No. 99–8376. BAYS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 87 Ohio St. 3d 15, 716 N. E. 2d 1126.

No. 99–8378. DEL VALLE HERNANDEZ *v.* NEW YORK CITY LAW DEPARTMENT CORPORATION COUNSEL ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 258 App. Div. 2d 390, 685 N. Y. S. 2d 674.

No. 99–8381. Flood *v.* Frank, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 816.

No. 99–8382. Farrell *v.* Pataki, Governor of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1322.

No. 99–8385. Graham *v.* Texas. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 99–8387. Harris *v.* Florida Department of Corrections et al. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 287.

No. 99–8389. Van Tran *v.* Tennessee. Sup. Ct. Tenn. Certiorari denied. Reported below: 6 S. W. 3d 257.

No. 99–8394. McCray *v.* Hine et al. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 99–8400. Leininger *v.* Washington. Ct. App. Wash. Certiorari denied.

No. 99–8401. Kubica *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8409. Williams *v.* Moore, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied. Reported below: 743 So. 2d 16.

No. 99–8411. Larson *v.* Trippett, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 188 F. 3d 508.

No. 99–8413. Atwood *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 602 N. W. 2d 775.

No. 99–8436. Casellas *v.* McGinnis, Superintendent, Southport Correctional Facility, et al. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1321.

No. 99–8444. Redeagle-Belgarde *v.* Lambert, Superintendent, Washington State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 199 F. 3d 1333.

No. 99–8459. Nickerson *v.* Luebbers, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 99–8467. Clark *v.* Angelone, Director, Virginia Department of Corrections. Sup. Ct. Va. Certiorari denied.

No. 99–8468. Christian *v.* Henderson, Postmaster General. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 477.

No. 99–8496. Lampson *v.* West, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 858.

No. 99–8519. Woods *v.* Vaughn, Superintendent, State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied.

No. 99–8531. Johnson, aka Campbell *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 742 A. 2d 205.

No. 99–8546. Reynolds *v.* Rooney et ux. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 99–8549. Robinson *v.* Norris, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 99–8556. Woodward *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 996 S. W. 2d 925.

No. 99–8584. Cabla *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 6 S. W. 3d 543.

No. 99–8590. Jackson *v.* Luebbers, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 99–8614. Armstrong *v.* Gammon, Superintendent, Moberly Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 195 F. 3d 441.

No. 99–8619. Lockaby *v.* United States; and
No. 99–8791. McLeod *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1115.

No. 99–8621. ISAACS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 99–8627. CHESTER *v.* LOCK, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1345.

No. 99–8631. RICCHIO NAVARRO *v.* POOLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–8642. LEGETTE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 99–8650. DAVIDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 195 F. 3d 402.

No. 99–8651. GRAVES *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 52 M. J. 375.

No. 99–8668. AYTCH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 303 Ill. App. 3d 1096, 747 N. E. 2d 1104.

No. 99–8694. BUCHANAN *v.* TATE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–8695. CARTER *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–8700. NAUGLE *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 99–8750. FAULCON *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 185 F. 3d 861.

No. 99–8767. PALACIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 286.

No. 99–8769. MONROE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1330.

No. 99–8777. ANTHONY *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 99–8780. COHEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 99–8781. Weaver *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 195 F. 3d 123.

No. 99–8782. Washington *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 262.

No. 99–8783. Tenaud *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8789. Lowe *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 516.

No. 99–8793. Shashaty *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 251 Conn. 768, 742 A. 2d 786.

No. 99–8795. Javier Navarro *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1337.

No. 99–8798. Baker *v.* Ohio. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 99–8800. Williams et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 252.

No. 99–8807. Triplett *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 195 F. 3d 990.

No. 99–8815. Rothenbach *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 198 F. 3d 241.

No. 99–8818. White *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1353.

No. 99–8824. Allen *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 205 F. 3d 1354.

No. 99–1399. Bonnie Briar Syndicate, Inc. *v.* Town of Mamaroneck et al. Ct. App. N. Y. Motions of Pacific Legal Foundation and National Association of Home Builders for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 94 N. Y. 2d 96, 721 N. E. 2d 971.

No. 99–1484. Polyak *v.* Summers, Attorney General of Tennessee, et al. C. A. 6th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

*Rehearing Denied*

No. 99–1004. Michelfelder *v.* Thomas Jefferson University et al., 528 U. S. 1158;

No. 99–1104. White et ux. *v.* Security Pacific Financial Services, Inc., 528 U. S. 1160;

No. 99–1121. Luna *v.* County of San Bernardino et al., 528 U. S. 1161;

No. 99–1130. Clanton *v.* Township of Redford, *ante*, p. 1004;

No. 99–1135. Chappell, in Interest of A. M. K. *v.* Meese et al., 528 U. S. 1189;

No. 99–1322. Cowhig *v.* Caldera, Secretary of the Army, *ante*, p. 1005;

No. 99–5279. Smith *v.* Moore, Secretary, Florida Department of Corrections, 528 U. S. 896;

No. 99–7307. Beckham *v.* Cain, Warden, 528 U. S. 1166;

No. 99–7329. Silo *v.* Shalala, Secretary of Health and Human Services, 528 U. S. 1128;

No. 99–7700. Coombs *v.* Pennsylvania, *ante*, p. 1008;

No. 99–7737. Calhoun *v.* DeTella, Warden, et al., *ante*, p. 1009; and

No. 99–7754. Abbey *v.* Robert Bosch GmbH et al., *ante*, p. 1009. Petitions for rehearing denied.

No. 98–1109. Shalala, Secretary of Health and Human Services, et al. *v.* Illinois Council on Long Term Care, Inc., *ante*, p. 1. Petition for rehearing or, in the alternative, to modify the opinion denied.

April 26, 2000

*Miscellaneous Order*

No. 99–9212 (99A874). In re Boyd. Application for stay of execution of sentence of death, presented to Justice Breyer, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

April 27, 2000

*Dismissal Under Rule 46*

No. 99–1508. Rayonier Inc. *v.* Beaver; and Rayonier Inc. *v.* Blanton. C. A. 11th Cir. Certiorari dismissed under this

Court's Rule 46. Reported below: 200 F. 3d 723 (first judgment); 199 F. 3d 443 (second judgment).

### May 1, 2000

*Certiorari Dismissed*

No. 99–8348. Wilkerson *v.* Nielsen, Chairman, California Board of Prison Terms. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 99–8465. Nagy *v.* Lappin et al. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 199 F. 3d 1327.

*Miscellaneous Orders*

No. 99A829. Williams *v.* Texas. 242d Jud. Dist. Ct. Tex., Hale County. Application for stay, addressed to Justice Ginsburg and referred to the Court, denied.

No. 99M84. Salanik, a Minor by His Mother, Salanik *v.* Board of Education of Anne Arundel County et al. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 99–1496. Janakakis-Kostun *v.* Janakakis. Ct. App. Ky. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 99–8929. In re Johnson;
No. 99–8957. In re YoungBear; and
No. 99–8974. In re West. Petitions for writs of habeas corpus denied.

No. 99–9005. In re Abidekun. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506

U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 99–8206. IN RE HOLLOMAN. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 99–1132. ILLINOIS *v.* MCARTHUR. App. Ct. Ill., 4th Dist. Certiorari granted. Reported below: 304 Ill. App. 3d 395, 713 N. E. 2d 93.

No. 99–1295. GITLITZ ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari granted. Reported below: 182 F. 3d 1143.

*Certiorari Denied*

No. 98–10002. GRAHAM, AKA SANKOFA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 168 F. 3d 762.

No. 99–268. MIDDLETON *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 99–1246. DOLE FOOD CO., INC., ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 187 F. 3d 1362.

No. 99–1258. MCDONNELL DOUGLAS CORP. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 182 F. 3d 1319.

No. 99–1281. O. S. C. & ASSOCIATES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 3d 1116.

No. 99–1332. BROKAMP ET UX. *v.* MERCY HOSPITAL ANDERSON ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 132 Ohio App. 3d 850, 726 N. E. 2d 594.

No. 99–1371. GAL-OLIVER ET UX. *v.* COUTTS BANK (SWITZERLAND) LTD., FKA COUTTS & CO. AG. C. A. 2d Cir. Certiorari denied. Reported below: 193 F. 3d 85.

No. 99–1407. Frank's Casing Crew & Rental Tools, Inc. *v.* Marine Drilling Management Co. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 873.

No. 99–1413. Calkins et ux., dba Indio Grocery Outlet *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. Reported below: 187 F. 3d 1080.

No. 99–1418. Ter Maat et al. *v.* Browning-Ferris Industries of Illinois, Inc., et al. C. A. 7th Cir. Certiorari denied. Reported below: 195 F. 3d 953.

No. 99–1419. City of New York et al. *v.* Tenenbaum et ux., Individually and on Behalf of Tenenbaum, an Infant. C. A. 2d Cir. Certiorari denied. Reported below: 193 F. 3d 581.

No. 99–1424. Wilson, Director, Missouri Department of Revenue *v.* Burlington Northern Santa Fe Railway Co. C. A. 8th Cir. Certiorari denied. Reported below: 193 F. 3d 984.

No. 99–1425. Borodaty et al. *v.* West Penn Power Co., Inc. C. A. 3d Cir. Certiorari denied. Reported below: 203 F. 3d 816.

No. 99–1428. Westendorp, a Minor, By and Through His Parents and Natural Guardians, Westendorp et vir, et al. *v.* Ventura, Governor of Minnesota, et al. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 3d 829.

No. 99–1430. Lunney, an Infant, by His Father and Natural Guardian, Lunney *v.* Prodigy Services Co. Ct. App. N. Y. Certiorari denied. Reported below: 94 N. Y. 2d 242, 723 N. E. 2d 539.

No. 99–1437. Cumberland Farms, Inc. *v.* Northeast Dairy Compact Commission et al.; and

No. 99–1438. New York State Dairy Foods, Inc., et al. *v.* Northeast Dairy Compact Commission et al. C. A. 1st Cir. Certiorari denied. Reported below: 198 F. 3d 1.

No. 99–1450. Green, Individually and as Administrator of the Estate of Green, Deceased, et al. *v.* Stelly et al. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 437.

No. 99–1453. United States ex rel. A–1 Ambulance Service, Inc., et al. *v.* County of Monterey et al. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 1238.

No. 99–1465. Bazzetta *v.* Yukins, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 201 F. 3d 440.

No. 99–1474. Williams *v.* Cigna Financial Advisors Inc. et al. C. A. 5th Cir. Certiorari denied. Reported below: 197 F. 3d 752.

No. 99–1476. Ott *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 192 F. 3d 510.

No. 99–1479. Haddad *v.* Lieberman. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1322.

No. 99–1493. Burgess *v.* Pelkey et al. Ct. App. D. C. Certiorari denied. Reported below: 738 A. 2d 783.

No. 99–1494. Lerman *v.* Township of Randolph et al. Super. Ct. N. J., App. Div. Certiorari denied.

No. 99–1495. Dunn *v.* Installation Technicians, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1345.

No. 99–1498. Davis *v.* Mille Lacs Band of Chippewa Indians et al. C. A. 8th Cir. Certiorari denied. Reported below: 193 F. 3d 990.

No. 99–1505. Fergason *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–1558. Behdani et al. *v.* Immigration and Naturalization Service. C. A. 11th Cir. Certiorari denied. Reported below: 196 F. 3d 1262.

No. 99–1573. Lai *v.* Dickinson et al. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1351.

No. 99–1585. Orr *v.* Internal Revenue Service. C. A. 5th Cir. Certiorari denied. Reported below: 180 F. 3d 656.

No. 99–1586. HOLT *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 52 M. J. 173.

No. 99–7110. RICHARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 99–7207. SHEPPARD *v.* PAINTER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 182 F. 3d 909.

No. 99–7239. FISCHLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 193 F. 3d 522.

No. 99–7716. CODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 99–7968. RICHARDSON *v.* SAY ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 740 So. 2d 771.

No. 99–8050. STEELE *v.* ALLISON, DIRECTOR, ORANGE COUNTY CORRECTIONAL FACILITY. C. A. 11th Cir. Certiorari denied.

No. 99–8162. GUZMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–8290. RYAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 257 Neb. 635, 601 N. W. 2d 473.

No. 99–8406. KESSLER *v.* BROWN & WILLIAMSON TOBACCO CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 182 F. 3d 932.

No. 99–8407. LIGGINS *v.* B. T. OFFICE PRODUCTS. C. A. 8th Cir. Certiorari denied.

No. 99–8419. MILES *v.* DUNNIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 99–8420. LINTON *v.* SULLIVAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 182 F. 3d 917.

No. 99–8428. SCOTT *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8432. WINKLE *v.* OAKLAND JOCKEY CLUB. C. A. 8th Cir. Certiorari denied.

No. 99–8433. Blitchington *v.* Moore, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied. Reported below: 749 So. 2d 502.

No. 99–8435. Atraqchi *v.* Murphy et al. C. A. D. C. Cir. Certiorari denied.

No. 99–8437. Valdez Ortiz *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1115.

No. 99–8438. Selman *v.* Sanders, Warden. C. A. 11th Cir. Certiorari denied.

No. 99–8440. Stell *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8445. Trinidad *v.* California. C. A. 9th Cir. Certiorari denied.

No. 99–8450. Wagoner *v.* Stubblefield, Superintendent, Missouri Eastern Correctional Center, et al. C. A. 8th Cir. Certiorari denied.

No. 99–8451. Wronke *v.* Steigmann, Justice, Appellate Court of Illinois, Fourth District. Sup. Ct. Ill. Certiorari denied.

No. 99–8456. McGovern *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 99–8461. Curry *v.* Walker et al. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 435.

No. 99–8466. Chandler *v.* Kennedy et al. C. A. 11th Cir. Certiorari denied.

No. 99–8471. Larch *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8479. Oden *v.* Prunty, Warden. C. A. 9th Cir. Certiorari denied.

No. 99–8488. Cowans *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 87 Ohio St. 3d 68, 717 N. E. 2d 298.

No. 99–8503. Prystash *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 3 S. W. 3d 522.

No. 99–8532. Medina *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 7 S. W. 3d 633.

No. 99–8541. Martinez *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 984 P. 2d 813.

No. 99–8580. Bell *v.* Thomas, Sheriff, et al. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 501.

No. 99–8583. Rebollar-Perez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–8587. Feurtado *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 191 F. 3d 420.

No. 99–8595. Raulerson *v.* Reno, Attorney General, et al. C. A. D. C. Cir. Certiorari denied.

No. 99–8636. Din *v.* Summers, Secretary of the Treasury. C. A. D. C. Cir. Certiorari denied.

No. 99–8672. Hamilton *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 351 N. C. 14, 519 S. E. 2d 514.

No. 99–8766. Richards *v.* Sondalle, Warden. C. A. 7th Cir. Certiorari denied.

No. 99–8770. Nyhuis *v.* Luebbers, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 99–8820. Ross *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 99–8823. Marcello *v.* Maine Department of Human Services. Sup. Jud. Ct. Me. Certiorari denied.

No. 99–8836. Alberto-Genao *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 203 F. 3d 53.

No. 99–8846. Monk *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 261.

No. 99–8849. Webb *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 449.

No. 99–8850. Evey *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 213 F. 3d 644.

No. 99–8851. Abouhalima *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 432.

No. 99–8852. Faiz *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8853. Evans *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 191 F. 3d 451.

No. 99–8855. Hernandez-Corona *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1353.

No. 99–8858. Fowler *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 210 F. 3d 357.

No. 99–8860. Draper *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 185 F. 3d 870.

No. 99–8863. Tang Xue Dan *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1325.

No. 99–8867. Williams *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 99–8873. Hopper *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 189 F. 3d 475.

No. 99–8874. Green *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 99–8875. Greenwood *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 3d 479.

No. 99–8876. Grist *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 259.

No. 99–8877. Custodio-Rossi *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 429.

No. 99–8879. Passaro *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 661.

No. 99–8887. Murchinson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 438.

No. 99–8890. Aiello *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 255.

No. 99–8891. Anderson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 260.

No. 99–8900. Lozano *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1338.

No. 99–8901. Lopez-Ayala, aka Prado-Perales *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 99–8902. King *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1353.

No. 99–8903. Moore *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1338.

No. 99–8907. Vinson *v.* Moore, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 820.

No. 99–8908. Mitchum *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 208 F. 3d 216.

No. 99–8917. McMillian *v.* Endicott, Warden. C. A. 7th Cir. Certiorari denied.

No. 99–899. Galaza, Warden, et al. *v.* Nino. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 183 F. 3d 1003.

No. 99–1159. McDaniel, Warden, et al. *v.* Wills. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 188 F. 3d 517.

No. 99–1184. Mack, Warden *v.* Paris. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 187 F. 3d 637.

No. 99–1070. People's Mojahedin Organization of Iran *v.* Department of State et al. C. A. D. C. Cir. Motion of the

Solicitor General for leave to lodge under seal a copy of the sealed version of the brief for appellees filed in the United States Court of Appeals granted. Certiorari denied. Reported below: 182 F. 3d 17.

No. 99–1449. MASSACHUSETTS FOOD ASSN. ET AL. *v.* MASSACHUSETTS ALCOHOLIC BEVERAGE CONTROL COMMISSION ET AL. C. A. 1st Cir. Motion of Beer Distributors of Massachusetts, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 197 F. 3d 560.

No. 99–1464. E. I. DU PONT DE NEMOURS & CO. ET AL. *v.* MURAKAMI ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 191 F. 3d 460.

*Rehearing Denied*

No. 99–1166. CREWS *v.* DEPARTMENT OF THE ARMY, 528 U. S. 1182;

No. 99–6776. ZHARN *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL., 528 U. S. 1086;

No. 99–7222. IN RE MAYES, 528 U. S. 1073;

No. 99–7437. JOSEPH *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., 528 U. S. 1169;

No. 99–7536. GULLEY *v.* GEORGIA, 528 U. S. 1172;

No. 99–7720. RETTIG *v.* KENT CITY SCHOOL DISTRICT ET AL., *ante*, p. 1023;

No. 99–7726. WISE *v.* CADDELL CONSTRUCTION CO., INC., *ante*, p. 1009; and

No. 99–8129. COBBS *v.* UNITED STATES POSTAL SERVICE ET AL., *ante*, p. 1028. Petitions for rehearing denied.

MAY 3, 2000

*Miscellaneous Order*

No. 99–9207 (99A873). IN RE JACKSON. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MAY 11, 2000

*Certiorari Denied*

No. 99–9483 (99A929). MCBRIDE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 15, 2000

*Dismissal Under Rule 46*

No. 99–1025. BANKBOSTON, N. A. *v.* SUAREZ ET UX. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 198 F. 3d 234.

*Certiorari Granted—Vacated and Remanded*

No. 99–437. LEHMAN, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS *v.* MACFARLANE ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to dismiss the case as moot. Reported below: 179 F. 3d 1131.

*Certiorari Dismissed*

No. 99–8528. SIKORA *v.* BOHN. Ct. App. Neb. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 8 Neb. App. lvii.

No. 99–8548. PATTERSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 204 F. 3d 1118.

No. 99–8983. SALLEE *v.* UNITED STATES PAROLE COMMISSION. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 187 F. 3d 631.

No. 99–8898. NAGY *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. Reported below: 201 F. 3d 438.

*Miscellaneous Orders*

No. 99M85. SANWICK *v.* CARVER, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 99–1489. RAQUEL *v.* EDUCATION MANAGEMENT CORP. ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 99–8025. BIERLEY *v.* CONNELLY, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, ERIE COUNTY, ET AL. C. A. 3d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1050] denied.

No. 99–8457. IN RE LILLIBRIDGE; and
No. 99–9035. IN RE FARLEY. Petitions for writs of habeas corpus denied.

No. 99–1673. IN RE HIRSCHFELD. Motion of petitioner to defer consideration of petition for writ of habeas corpus denied. Petition for writ of habeas corpus denied.

No. 99–1652. IN RE RUIZ RIVERA;
No. 99–8498. IN RE MELONCON;
No. 99–8512. IN RE TASBY;
No. 99–8545. IN RE PYTEL; and
No. 99–9026. IN RE JARVIS. Petitions for writs of mandamus denied.

*Certiorari Denied*

No. 99–592. COLLINS ET AL. *v.* SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1; and
No. 99–788. SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1 *v.* COLLINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 1124.

No. 99–1084. METRO-NORTH COMMUTER RAILROAD CO. *v.* NORRIS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 191 F. 3d 283.

No. 99–1165. LaFargue et al. *v.* United States et al. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 3d 516.

No. 99–1170. Yost *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 185 F. 3d 1178.

No. 99–1174. Roberts *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 185 F. 3d 1125.

No. 99–1191. Glover *v.* West, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 185 F. 3d 1328.

No. 99–1193. Frazer *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 21 Cal. 4th 737, 982 P. 2d 180.

No. 99–1259. Arizaga Ramos *v.* District Director, Executive Office for Immigration Review, Office of Immigration Judge. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 279.

No. 99–1279. Swenson et ux. *v.* Washington Department of Social and Health Services. Ct. App. Wash. Certiorari denied. Reported below: 94 Wash. App. 511, 973 P. 2d 474.

No. 99–1321. American Society of Association Executives *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 195 F. 3d 47.

No. 99–1325. Environ Products, Inc. *v.* Intelpro Corp. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 852.

No. 99–1344. Livoti *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 196 F. 3d 322.

No. 99–1361. Caprotti, for Herself and on Behalf of Her Three Minor Sons, Caprotti et al. *v.* Town of Woodstock et al. Ct. App. N. Y. Certiorari denied. Reported below: 94 N. Y. 2d 73, 721 N. E. 2d 957.

No. 99–1374. Watkins *v.* Professional Security Bureau, Ltd. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–1415. Adams *v.* Driscoll et al. C. A. 11th Cir. Certiorari denied. Reported below: 181 F. 3d 1285.

No. 99–1456. FLEMING SUPERMARKETS OF FLORIDA, INC. *v.* DAMON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 196 F. 3d 1354.

No. 99–1466. GRASSINI *v.* DUPAGE TOWNSHIP ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 304 Ill. App. 3d 1092, — N. E. 2d —.

No. 99–1473. LOUISIANA, THROUGH FOSTER, GOVERNOR, ET AL. *v.* PENN ET AL. Sup. Ct. La. Certiorari denied. Reported below: 751 So. 2d 823.

No. 99–1475. STONIER ET AL. *v.* DIGITAL EQUIPMENT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 198 F. 3d 234.

No. 99–1477. HEARN *v.* BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM. C. A. 11th Cir. Certiorari denied. Reported below: 191 F. 3d 1329.

No. 99–1485. CORCORAN, EXECUTRIX OF THE ESTATE OF CORCORAN, DECEASED *v.* NEW YORK POWER AUTHORITY ET AL.; and CORCORAN, EXECUTRIX OF THE ESTATE OF CORCORAN, DECEASED *v.* SINCLAIR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 202 F. 3d 530 (first judgment); 201 F. 3d 430 (second judgment).

No. 99–1488. PACIFIC ETERNITY, S. A., ET AL. *v.* DEIULEMAR COMPAGNIA DI NAVIGAZIONE, S. P. A. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 473.

No. 99–1499. BAUMGARD ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 853.

No. 99–1503. NELSON *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA, INC. C. A. 9th Cir. Certiorari denied.

No. 99–1506. CERIDIAN CORP., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CONTROL DATA CORP. *v.* BARKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 193 F. 3d 976.

No. 99–1510. MCLAREN *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 996 S. W. 2d 404.

No. 99–1512. ANGELO, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEE, DEBTOR, DECEASED *v.* GEE. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1115.

No. 99–1514. Jones *v.* Waremart Foods, Inc. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–1516. Fry's Food Stores of Arizona, Inc. *v.* Snyder. C. A. 9th Cir. Certiorari denied. Reported below: 201 F. 3d 445.

No. 99–1519. Norfolk Southern Railway Co. *v.* Bailey et al. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 206 W. Va. 654, 527 S. E. 2d 516.

No. 99–1521. Estates of Red Wolf and Bull Tail et al. *v.* Burlington Northern Railroad Co. C. A. 9th Cir. Certiorari denied. Reported below: 196 F. 3d 1059.

No. 99–1522. White *v.* Regents of the University of California et al. C. A. 9th Cir. Certiorari denied. Reported below: 188 F. 3d 516.

No. 99–1523. United States ex rel. A–1 Ambulance Service, Inc. *v.* County of Los Angeles et al. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 381.

No. 99–1524. Louisiana Department of Transportation and Development *v.* Long, on Behalf of His Minor Son, Long, et al. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 743 So. 2d 743.

No. 99–1527. Woodward, Individually and as Bernalillo County Clerk, et al. *v.* Perry. C. A. 10th Cir. Certiorari denied. Reported below: 199 F. 3d 1126.

No. 99–1528. Moore *v.* Molina et al. C. A. 7th Cir. Certiorari denied. Reported below: 182 F. 3d 922.

No. 99–1536. D. H. L. Associates, Inc. *v.* O'Gorman et al. C. A. 1st Cir. Certiorari denied. Reported below: 199 F. 3d 50.

No. 99–1539. McCleary et al. *v.* Mirza, District Mining Manager, Pennsylvania Department of Environmental Protection, et al. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1329.

No. 99–1542. Lynas *v.* Lynas. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 99–1543. Johnson *v.* Johnson et al. C. A. 6th Cir. Certiorari denied.

No. 99–1547. Nisco *v.* Town of Perinton. Ct. App. N. Y. Certiorari denied. Reported below: 93 N. Y. 2d 1040, 719 N. E. 2d 928.

No. 99–1550. Correia *v.* Meachum, Connecticut Commissioner of Corrections, et al. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 430.

No. 99–1576. Barnett *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 197 F. 3d 138.

No. 99–1578. Accuracy in Media, Inc. *v.* National Park Service. C. A. D. C. Cir. Certiorari denied. Reported below: 194 F. 3d 120.

No. 99–1587. Evans *v.* Hobbs, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 288.

No. 99–1589. Ramey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 438.

No. 99–1593. Jackson *v.* Gammon, Superintendent, Moberly Correctional Center, et al. C. A. 8th Cir. Certiorari denied. Reported below: 195 F. 3d 349.

No. 99–1598. Horton *v.* Norfolk Southern Railway Co. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1327.

No. 99–1601. Davis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 820.

No. 99–1606. Pierce *v.* Lucero, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 282.

No. 99–1608. Ysleta del Sur Pueblo *v.* Texas. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–1622. Arnold et al. *v.* Merit Systems Protection Board et al. C. A. Fed. Cir. Certiorari denied. Reported below: 230 F. 3d 1377.

No. 99–1628. Montana *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 199 F. 3d 947.

No. 99–1631. Iceland Steamship Co., Ltd.-Eimskip *v.* Department of the Army et al. C. A. D. C. Cir. Certiorari denied. Reported below: 201 F. 3d 451.

No. 99–1645. Krilich *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 99–1654. Woods *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–1664. Stewart, aka Sealed Defendant 2 *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 840.

No. 99–1668. Klisser *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 189 F. 3d 462 and 190 F. 3d 34.

No. 99–1669. Acosta *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 820.

No. 99–7715. Bruce *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 181 F. 3d 92.

No. 99–7896. Huggins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 191 F. 3d 532.

No. 99–7916. Kulczak *v.* Konteh, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–7938. Moore *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–8158. Deedrick *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 202 F. 3d 286.

No. 99–8181. Bolden *v.* Hesson, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 194 F. 3d 579.

No. 99–8224. Thibodeaux *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 750 So. 2d 916.

No. 99–8474. Safouane et ux. *v.* Washington Department of Social and Health Services. Ct. App. Wash. Certiorari denied. Reported below: 95 Wash. App. 1049.

No. 99–8481. O'Neal *v.* Sinnreich & Francisco et al. C. A. 11th Cir. Certiorari denied. Reported below: 203 F. 3d 841.

No. 99–8482. Pennington *v.* Caggiano et al. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 723 So. 2d 931.

No. 99–8484. Orbe *v.* Virginia. Sup. Ct. Va. Certiorari denied. Reported below: 258 Va. 390, 519 S. E. 2d 808.

No. 99–8485. Williams *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 706 N. E. 2d 149.

No. 99–8486. Webb *v.* Evans, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 284.

No. 99–8493. Thornburg *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 985 P. 2d 1234.

No. 99–8497. McDonald *v.* Meyers, Superintendent, State Correctional Institution at Rockview, et al. C. A. 3d Cir. Certiorari denied.

No. 99–8499. Martin *v.* Perez et al. C. A. 5th Cir. Certiorari denied. Reported below: 204 F. 3d 1114.

No. 99–8500. Lewis *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 301 Ill. App. 3d 1087, 746 N. E. 2d 338.

No. 99–8502. Poole *v.* Mitchem, Warden, et al. C. A. 11th Cir. Certiorari denied.

No. 99–8504. Shabazz *v.* West Virginia. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 206 W. Va. 555, 526 S. E. 2d 521.

No. 99–8506. Richardson *v.* Luebbers, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 188 F. 3d 973.

No. 99–8507. Leon *v.* Estrada et al. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 3d 1340.

No. 99–8511. Tolbert *v.* KPHN Radio et al. C. A. 10th Cir. Certiorari denied. Reported below: 194 F. 3d 1321.

No. 99–8514. Thibeaux *v.* Jackson et al. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1338.

No. 99–8520. WILSON *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8521. WATERS *v.* HESSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–8523. WRIGHT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 753 So. 2d 211.

No. 99–8524. QUINONES *v.* GREINER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8526. BITTERMAN *v.* HARDING, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 184 F. 3d 822.

No. 99–8533. JOHNSON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 747 So. 2d 61.

No. 99–8535. GASKINS *v.* O'MALLEY, MAYOR OF THE CITY OF BALTIMORE. C. A. 4th Cir. Certiorari denied.

No. 99–8538. BREMER *v.* HOUSING AUTHORITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari denied.

No. 99–8539. MCBAY *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 99–8540. NICKERSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 767 So. 2d 419.

No. 99–8543. ALLEN *v.* TIME WARNER CABLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 819.

No. 99–8551. MARCHAN MORENO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–8552. BRAUN *v.* GIBSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 190 F. 3d 1181.

No. 99–8553. ANDERSON *v.* LINAHAN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 264.

No. 99–8554. BRAZZELL *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 201 F. 3d 440.

No. 99–8555. Wayne *v.* Jarvis, Sheriff, DeKalb County, Georgia, et al. C. A. 11th Cir. Certiorari denied. Reported below: 197 F. 3d 1098.

No. 99–8564. Coker *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 99–8565. Douglas *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8566. Haynes *v.* Federal Aviation Administration. C. A. 10th Cir. Certiorari denied. Reported below: 198 F. 3d 258.

No. 99–8570. Frank *v.* Nebraska. Ct. App. Neb. Certiorari denied. Reported below: 8 Neb. App. xcvi.

No. 99–8573. Gonzalez *v.* Askins et al. C. A. 4th Cir. Certiorari denied. Reported below: 178 F. 3d 1283.

No. 99–8577. Habelman *v.* Garvey, Administrator, Federal Aviation Administration. C. A. 5th Cir. Certiorari denied. Reported below: 190 F. 3d 537.

No. 99–8579. Roberts *v.* Langley, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–8582. Candelaria *v.* LeMaster, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 447.

No. 99–8588. Bates *v.* Boone, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 447.

No. 99–8589. Alvarez *v.* Washington. Sup. Ct. Wash. Certiorari denied.

No. 99–8592. Carpenter *v.* Greiner, Superintendent, Sing Sing Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 99–8594. Owens *v.* Pitcher, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–8599. Wolfe *v.* Louisiana. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 738 So. 2d 1093.

No. 99-8602. Cox *v.* Hooks, Warden. C. A. 11th Cir. Certiorari denied.

No. 99-8604. Powell *v.* Texas. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 5 S. W. 3d 369.

No. 99-8605. Scott *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 99-8606. Reynolds *v.* Galaza, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 198 F. 3d 254.

No. 99-8610. Thompkins *v.* Hicks, Warden. C. A. 11th Cir. Certiorari denied.

No. 99-8611. Thompson *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99-8620. Moore *v.* Relin. C. A. 2d Cir. Certiorari denied.

No. 99-8622. Love *v.* Cuyahoga County Prosecutor's Office et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 87 Ohio St. 3d 158, 718 N. E. 2d 426.

No. 99-8626. Collins *v.* G/H Contracting Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 201 F. 3d 440.

No. 99-8640. Hukill *v.* Auto Care, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 192 F. 3d 437.

No. 99-8660. Whiting *v.* Scott, Executive Director, Texas Department of Criminal Justice, et al. C. A. 5th Cir. Certiorari denied.

No. 99-8662. Worthington *v.* Missouri. Sup. Ct. Mo. Certiorari denied. Reported below: 8 S. W. 3d 83.

No. 99-8665. Biggs *v.* Borg, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 205 F. 3d 1350.

No. 99-8674. Poe *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8678. Miranda *v.* Workers' Compensation Appeals Board of California. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 99–8713. Lewis *v.* Donnelly. C. A. 5th Cir. Certiorari denied.

No. 99–8727. Olivo Rodriguez *v.* Walker, Superintendent, Auburn Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 99–8734. Carter *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 200 F. 3d 815.

No. 99–8737. Benson *v.* Robinson, Warden. C. A. 6th Cir. Certiorari denied.

No. 99–8743. Flanagan *v.* Arnaiz et al. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 830.

No. 99–8749. Westenburg *v.* Consolidated Freightways, Inc. Ct. App. Ore. Certiorari denied.

No. 99–8757. Fink *v.* Shedler et al. C. A. 9th Cir. Certiorari denied. Reported below: 192 F. 3d 911.

No. 99–8765. Clements *v.* Florida Parole and Probation Commission. C. A. 11th Cir. Certiorari denied.

No. 99–8778. Bybee *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8790. Jackson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 202 F. 3d 264.

No. 99–8805. Williams *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 449.

No. 99–8806. Young *v.* Smeeks. C. A. 6th Cir. Certiorari denied. Reported below: 205 F. 3d 1343.

No. 99–8808. Smith *v.* Gilmore, Warden. C. A. 7th Cir. Certiorari denied.

No. 99–8821. WOODARD *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8822. JERRY M. *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 738 A. 2d 1206.

No. 99–8826. PRIHODA *v.* SONDALLE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–8828. PRATT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 742 A. 2d 209.

No. 99–8831. TRUITT *v.* MOORE, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 99–8835. JOHNSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 99–8844. COROPUNA *v.* VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 182 F. 3d 907.

No. 99–8847. ALFONSO JAIME *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 99–8856. DEESE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 753 So. 2d 94.

No. 99–8859. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 178 F. 3d 1286.

No. 99–8864. FIDALGO *v.* UNITED STATES; and
No. 99–8981. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 184 F. 3d 821.

No. 99–8871. BELLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–8872. COLLIER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 99–8878. MUNOZ-AMADO, AKA MUNOZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 182 F. 3d 57.

No. 99–8893. Perkins *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 205 F. 3d 1355.

No. 99–8894. Simmons *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8897. McCoy *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 188 F. 3d 504.

No. 99–8916. Montgomery *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 99–8919. Buitrago *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 183 F. 3d 1315.

No. 99–8920. Clark *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 195 F. 3d 446.

No. 99–8922. Townsend *v.* Booker, Superintendent, Mississippi State Penitentiary, et al. C. A. 5th Cir. Certiorari denied. Reported below: 200 F. 3d 816.

No. 99–8923. Wright *v.* Rowley, Superintendent, Northeast Correctional Center, et al. C. A. 8th Cir. Certiorari denied.

No. 99–8926. Dougherty *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 819.

No. 99–8928. Lankford *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 196 F. 3d 563.

No. 99–8932. Austin *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–8933. Auborg et al. *v.* Massachusetts. App. Ct. Mass. Certiorari denied. Reported below: 48 Mass. App. 1106, 718 N. E. 2d 896.

No. 99–8934. Andrews *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 201 F. 3d 429.

No. 99–8936. Ascura *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 99–8937. Olds *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 238.

No. 99–8938. DE LA LUZ SALDANA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 202 F. 3d 265.

No. 99–8940. SCARBOROUGH *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 99–8944. WHEELS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 99–8946. ARMENTROUT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 8 S. W. 3d 99.

No. 99–8949. IREDIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 203 F. 3d 828.

No. 99–8952. STRADWICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1329.

No. 99–8959. BRYANT *v.* IRVIN, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8964. WAI CHONG LEUNG *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 99–8966. WILLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–8967. WILSON *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 201 F. 3d 439.

No. 99–8969. CLYBURN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 260.

No. 99–8970. COLLIERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 823.

No. 99–8971. JEMISON *v.* UNITED STATES; and
No. 99–9024. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 823.

No. 99–8972. WOMACK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–8979. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 199 F. 3d 1279.

No. 99–8984. Reed *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–8986. Boston *v.* Luebbers, Superintendent, Potosi Correctional Center, et al. C. A. 8th Cir. Certiorari denied. Reported below: 202 F. 3d 1001.

No. 99–8987. Carter *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 659.

No. 99–8990. Covington *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 823.

No. 99–8991. Milloway *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 261.

No. 99–8993. Montoya *v.* LeMaster, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 282.

No. 99–8996. Olguin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–8997. Nario Soto et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 261.

No. 99–8998. Prince *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 204 F. 3d 1021.

No. 99–9004. Beavers *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 206 F. 3d 706.

No. 99–9011. Dawkins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 711.

No. 99–9015. Farah *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 661.

No. 99–9018. White *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 99–9019. Tawalbeh *v.* United States;
No. 99–9071. Abed *v.* United States;
No. 99–9072. Abed *v.* United States; and
No. 99–9074. Abed *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 822.

No. 99–9021. Whitfield *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 657.

No. 99–9023. Young-Bey *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 127 Md. App. 797.

No. 99–9027. Parrott *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 824.

No. 99–9028. Cobb *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1328.

No. 99–9032. Bentley *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 663.

No. 99–9034. Orcutt *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 208 F. 3d 204.

No. 99–9036. Duncan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 191 F. 3d 569.

No. 99–9041. Gutierrez-Gonzalez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 438.

No. 99–9051. Corley *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 741 A. 2d 1029.

No. 99–9053. Roseboro *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1329.

No. 99–9054. Walker *v.* Conroy, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 825.

No. 99–9055. Varela *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 661.

No. 99–9060. Ray *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 173 F. 3d 853.

No. 99–9064. Maguire *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 739 A. 2d 589.

No. 99–9065. Montillo-Ontiveros *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–9076. Calas *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 200 F. 3d 819.

No. 99–9080. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9083. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1348.

No. 99–9086. NAMEY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 205 F. 3d 1330.

No. 99–9088. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 207 F. 3d 661.

No. 99–9089. CASTANEDA-CEJA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–9090. BUSTAMANTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 659.

No. 99–9101. NATHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 230.

No. 99–9102. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–9103. MUNGAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 99–9111. MARTIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 836.

No. 99–9120. VILLAGRAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 207.

No. 99–9178. CONWAY *v.* GAMBLE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 99–9194. JONES *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 990 P. 2d 1098.

No. 99–1176. MCI COMMUNICATIONS CORP. AND SUBSIDIARIES ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 192 F. 3d 1068.

No. 99–1478. LABORA *v.* MCI TELECOMMUNICATIONS CORP. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 204 F. 3d 1121.

No. 99–1480. MRO Communications, Inc. *v.* AT&T Corp. C. A. 9th Cir. Certiorari denied. Justice O'Connor took no part in the consideration or decision of this petition. Reported below: 205 F. 3d 1351.

No. 99–1515. MRO Communications, Inc. *v.* AT&T Corp. C. A. 9th Cir. Certiorari denied. Justice O'Connor took no part in the consideration or decision of this petition. Reported below: 197 F. 3d 1276.

No. 99–1468. Florida *v.* Wilson. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 734 So. 2d 1107.

No. 99–1470. Sublett et al. *v.* Swoopes. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 196 F. 3d 1008.

No. 99–1564. Mahoney, Warden *v.* Gollehon. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 99–1502. Amoco Production Co. *v.* Lobo Exploration Co. Ct. Civ. App. Okla. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 991 P. 2d 1048.

No. 99–1591. Goode, dba Mr. Bones BBQ *v.* City of Austin et al. C. A. 5th Cir. Motion of Americans for the Defense of Constitutional Rights for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 202 F. 3d 265.

*Rehearing Denied*

No. 98–9727. Bisby *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, 528 U. S. 849;

No. 99–220. DCR, Inc., et al. *v.* Pierce County, *ante*, p. 1053;

No. 99–949. Dahlstrom *v.* United States, *ante*, p. 1036;

No. 99–1013. Miccosukee Tribe of Indians of Florida et al. *v.* Tamiami Partners, LTD, By and Through Its General Partner, Tamiami Development Corp., *ante,* p. 1018;

No. 99–1260. Weldon et ux. *v.* Farm Credit Services of Michigan's Heartland, PCA, *ante,* p. 1021;

No. 99–1297. Mensah *v.* St. Joseph County Family Independence Agency et al., *ante,* p. 1038;

No. 99–5134. Howland *v.* Texas, 528 U. S. 887;

No. 99–7157. Rasten *v.* Department of Labor, 528 U. S. 1124;

No. 99–7179. Zimbovsky *v.* Massachusetts, 528 U. S. 1125;

No. 99–7282. Sirbaugh *v.* Elo, Warden, 528 U. S. 1165;

No. 99–7363. Randon *v.* Hubbard, Warden, 528 U. S. 1167;

No. 99–7409. Lane *v.* National Data Corp., *ante,* p. 1023;

No. 99–7525. Weeks *v.* Moore, Secretary, Florida Department of Corrections, 528 U. S. 1171;

No. 99–7572. McFadden *v.* Ford Motor Co. et al., 528 U. S. 1192;

No. 99–7717. Crosby *v.* Lambert et al., *ante,* p. 1009;

No. 99–7762. Robinson *v.* Luker et al., *ante,* p. 1024;

No. 99–7775. Alvarado *v.* McKay et al., *ante,* p. 1024;

No. 99–7798. Bradley *v.* United States, 528 U. S. 1193;

No. 99–7814. In re Davage, 528 U. S. 1187;

No. 99–7927. McKire *v.* Moore, Secretary, Florida Department of Corrections, et al., *ante,* p. 1040;

No. 99–8021. Marcum *v.* Oscar Mayer Foods Corp. et al., *ante,* p. 1041;

No. 99–8143. Montanya *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, *ante,* p. 1042;

No. 99–8226. Wallace *v.* Florida, *ante,* p. 1030; and

No. 99–8241. Bostedt *v.* Wisconsin, *ante,* p. 1031. Petitions for rehearing denied.

No. 99–835. Stewart *v.* United States, 528 U. S. 1063;

No. 99–1213. Williams et al. *v.* Michigan et al., *ante,* p. 1020; and

No. 99–5771. Hart et ux. *v.* Elder et al., 528 U. S. 953. Motions for leave to file petitions for rehearing denied.

No. 99–1224. Lefkowitz *v.* United States, 528 U. S. 1190. Motion of petitioner for leave to proceed further herein *in forma* *pauperis* granted. Motion for leave to file petition for rehearing denied.

May 18, 2000

*Dismissal Under Rule 46*

No. 99–9008. Gollehon *v.* Mahoney, Warden. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1.

May 22, 2000

*Certiorari Granted—Vacated and Remanded*

No. 99–1227. Bryon L. Rosquist, D. C., P. C., et al. *v.* McCann et al. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Morrison*, *ante*, p. 598. Reported below: 185 F. 3d 1113.

No. 99–1583. Pennsylvania *v.* D. M. Sup. Ct. Pa. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Illinois* v. *Wardlow*, 528 U. S. 119 (2000). Reported below: 560 Pa. 166, 743 A. 2d 422.

*Certiorari Dismissed*

No. 99–8696. Buchanan *v.* Doe. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 198 F. 3d 244.

No. 99–8752. Gibson *v.* Susquehanna Township Commissioners. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 203 F. 3d 816.

*Miscellaneous Orders*

No. D–2137. In re Disbarment of Gereighty. Disbarment entered. [For earlier order herein, see 528 U. S. 1112.]

No. D–2140. In re Disbarment of Moore. Disbarment entered. [For earlier order herein, see 528 U. S. 1150.]

No. D–2143. In re Disbarment of Spina. Disbarment entered. [For earlier order herein, see 528 U. S. 1150.]

No. D–2146. In re Disbarment of Scully. Disbarment entered. [For earlier order herein, see 528 U. S. 1150.]

No. D–2147. In re Disbarment of Carlson. Disbarment entered. [For earlier order herein, see 528 U. S. 1151.]

No. D–2151. In re Disbarment of Travis. Disbarment entered. [For earlier order herein, see *ante*, p. 1035.]

No. D–2155. In re Disbarment of Moore. Disbarment entered. Justice Stevens, Justice Kennedy, Justice Souter, and Justice Ginsburg dissent. [For earlier order herein, see *ante*, p. 1063.]

No. D–2160. In re Disbarment of Tierney. James Patrick Tierney, of Malibu, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2161. In re Disbarment of Sokolow. Lloyd B. Sokolow, of Schenectady, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2162. In re Disbarment of Murchison. Alton G. Murchison III, of Charlotte, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2163. In re Disbarment of Friedler. Sydney Friedler, of Hempstead, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2164. In re Disbarment of Carlson. Robert Bent Carlson, of North Port, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2165. In re Disbarment of Tamer. David Ferris Tamer, of Winston-Salem, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 99M87. ZIMBOVSKY *v.* MASSACHUSETTS. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 99M88. TILLIS TRUCKING CO., INC. *v.* MOSES ET AL.; and No. 99M89. HUERTAS BARBOSA ET AL. *v.* ALEJANDRO BUITRAGO HOSPITAL ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 99–1295. GITLITZ ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1097.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 99–8264. DELESPINE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1063] denied.

No. 99–9052. SAMUEL *v.* NATHAN'S FAMOUS OPERATING CORP. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 12, 2000, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 99–9267. IN RE CAVANAUGH. Petition for writ of habeas corpus denied.

No. 99–9294. IN RE GALLOWAY. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 99–8724. In re King;
No. 99–8751. In re Harris; and
No. 99–8829. In re Short. Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 99–1257. Browner, Administrator of Environmental Protection Agency, et al. *v.* American Trucking Assns., Inc., et al. C. A. D. C. Cir. Certiorari granted. Reported below: 175 F. 3d 1027 and 195 F. 3d 4.

No. 99–1178. Solid Waste Agency of Northern Cook County *v.* United States Army Corps of Engineers et al. C. A. 7th Cir. Motions of Pacific Legal Foundation and Randy Peterson, National Association of Home Builders, and American Farm Bureau Federation for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 191 F. 3d 845.

No. 99–1379. Circuit City Stores, Inc. *v.* Adams. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 194 F. 3d 1070.

No. 99–6218. Rogers *v.* Tennessee. Sup. Ct. Tenn. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 992 S. W. 2d 393.

*Certiorari Denied*

No. 98–1996. Pelchat *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 175 F. 3d 1025.

No. 98–9402. Davis *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 173 F. 3d 430.

No. 98–9601. Bearden *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 178 F. 3d 1296.

No. 99–1203. Theriot et al. *v.* Parish of Jefferson et al. C. A. 5th Cir. Certiorari denied. Reported below: 185 F. 3d 477.

No. 99–1209. Novato Fire Protection District *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 181 F. 3d 1135.

No. 99–1283. Kumar *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 187 F. 3d 639.

No. 99–1367. Abbott et al. *v.* Medgar Evers Houses Associates, L. P., et al. C. A. 2d Cir. Certiorari denied. Reported below: 201 F. 3d 430.

No. 99–1370. New York et al. *v.* Yonkers Board of Education et al. C. A. 2d Cir. Certiorari denied. Reported below: 197 F. 3d 41.

No. 99–1439. Anderegg *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 96 Wash. App. 167, 978 P. 2d 1121.

No. 99–1526. University of Colorado Foundation, Inc., et al. *v.* American Cyanamid Co. C. A. Fed. Cir. Certiorari denied. Reported below: 196 F. 3d 1366.

No. 99–1537. Borden, Inc., et al. *v.* Morton's Market, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 823.

No. 99–1538. Taranto, dba Tundra Taxi *v.* North Slope Borough. Sup. Ct. Alaska. Certiorari denied. Reported below: 992 P. 2d 1111.

No. 99–1545. Gonzales et ux., Individually and as Personal Representatives of the Estate of Gonzales, Deceased *v.* City of Kerrville et al. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1337.

No. 99–1546. Lake Charles Stevedores, Inc. *v.* Professor Vladimir Popov MV in rem. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 220.

No. 99–1561. Oliver et vir *v.* Saha et al. Ct. App. Ky. Certiorari denied.

No. 99–1569. Davis *v.* Hanover Insurance Co. App. Ct. Mass. Certiorari denied. Reported below: 48 Mass. App. 1108, 719 N. E. 2d 896.

No. 99–1588. Stanton *v.* District of Columbia Court of Appeals. C. A. D. C. Cir. Certiorari denied.

No. 99–1599. Hopper et al. *v.* Robinson, Administrator of the Attorney Registration and Disciplinary Commission of Illinois. Sup. Ct. Ill. Certiorari denied.

No. 99–1610. Ysleta del Sur Pueblo *v.* Laney et al. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 281.

No. 99–1617. McMaster *v.* Michigan National Corp. et al. Sup. Ct. Mich. Certiorari denied. Reported below: 459 Mich. 989, 595 N. W. 2d 823.

No. 99–1661. Rennert *v.* United States; Miller *v.* United States; and Jensen *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 202 F. 3d 255.

No. 99–1670. Webb et ux. *v.* Mendenhall et al. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 388.

No. 99–1703. Choe *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 203 F. 3d 833.

No. 99–1712. Benavides *v.* Gerver et ux. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 207 W. Va. 228, 530 S. E. 2d 701.

No. 99–6879. Marlow *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 187 F. 3d 644.

No. 99–7908. Rodia *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 194 F. 3d 465.

No. 99–7918. Williams *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 199 F. 3d 1324.

No. 99–7958. Dewberry *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 4 S. W. 3d 735.

No. 99–8016. Abram *v.* Laxton et al. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 249.

No. 99–8244. Richardson *v.* Richardson;
No. 99–8245. Richardson *v.* America Online;
No. 99–8246. Richardson *v.* Sprint PCS;
No. 99–8247. Richardson *v.* First National Bank of Maryland; and
No. 99–8287. Richardson *v.* Bell Atlantic Corp. C. A. 4th Cir. Certiorari denied. Reported below: 199 F. 3d 1327.

No. 99–8271. Burton *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 3d 461.

No. 99–8639. Duncan *v.* Barreras, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 447.

No. 99–8641. Jackson *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8643. McDowell *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 115 Nev. 575, 24 P. 3d 270.

No. 99–8646. Mahon *v.* County of Los Angeles et al. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 384.

No. 99–8648. Jones *v.* Commissioner of Labor of New York. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 258 App. Div. 2d 795, 685 N. Y. S. 2d 869.

No. 99–8664. Coffee *v.* Doth, Commissioner of Human Services of Minnesota. Ct. App. Minn. Certiorari denied.

No. 99–8669. Taylor *v.* Dees, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 190 F. 3d 543.

No. 99–8670. Welch *v.* Angelone, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 202 F. 3d 262.

No. 99–8671. Walker *v.* Akers et al. C. A. 7th Cir. Certiorari denied.

No. 99–8673. Stemley *v.* Foti, Sheriff of Orleans Parish, Louisiana, et al. C. A. 5th Cir. Certiorari denied.

No. 99–8679. Jeffers *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 99–8680. Manthei *v.* Bogan, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 201 F. 3d 448.

No. 99–8686. Aldridge *v.* Zulpo-Dane et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 99–8687. Angleton *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: 714 N. E. 2d 156.

No. 99–8689. Clay *v.* Sanders, Judge, Circuit Court of Mississippi, Wilkinson County. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 3d 440.

No. 99–8690. Ayers *v.* City of Memphis et al. C. A. 6th Cir. Certiorari denied.

No. 99–8693. Dominguez *v.* Kuhlmann, Superintendent, Sullivan Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 99–8698. Pruitt *v.* Irvin, Superintendent, Wende Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 99–8709. Stewart *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 302 Ill. App. 3d 1102, 746 N. E. 2d 915.

No. 99–8719. Williams *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 99–8722. Muhammad *v.* Florida Department of Corrections et al. C. A. 11th Cir. Certiorari denied.

No. 99–8723. Morse *v.* Moore, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 99–8726. Richardson *v.* Broad Lane, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 822.

No. 99–8728. Baptist *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 303 Ill. App. 3d 1118, 747 N. E. 2d 1115.

No. 99–8729. Kinchloe *v.* Michigan et al. C. A. 6th Cir. Certiorari denied.

No. 99–8730. Lassan *v.* City of Gulf Shores. Ct. Crim. App. Ala. Certiorari denied. Reported below: 778 So. 2d 877.

No. 99–8731. Lee *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 768 So. 2d 1032.

No. 99–8735. Cittadino *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 99–8736. Butler *v.* Pitzer, Warden, et al. C. A. 6th Cir. Certiorari denied.

No. 99–8738. ALFORD *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 208 F. 3d 205.

No. 99–8739. DUKE *v.* ABSENTEE SHAWNEE TRIBE OF OKLAHOMA HOUSING AUTHORITY. C. A. 10th Cir. Certiorari denied. Reported below: 199 F. 3d 1123.

No. 99–8744. HAIRSTON *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 133 Idaho 496, 988 P. 2d 1170.

No. 99–8756. PENNS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 758 So. 2d 776.

No. 99–8760. MCLEAN *v.* MEMBERS OF VIRGINIA BOARD OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 821.

No. 99–8761. MARSH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 99–8762. MURDOCK *v.* WASHINGTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 193 F. 3d 510.

No. 99–8763. ATKINS *v.* TESSMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 99–8764. CORONADO *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 99–8773. HILL *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 199 F. 3d 833.

No. 99–8784. COUTEE *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 198 F. 3d 249.

No. 99–8834. KIKUYAMA *v.* MADDOCK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 202 F. 3d 278.

No. 99–8845. CHAPPELL *v.* DEEDS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 198 F. 3d 236.

No. 99–8857. FARMER *v.* TRENT, WARDEN, ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 206 W. Va. 231, 523 S. E. 2d 547.

No. 99–8885. Sledge *v.* North Carolina. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 822.

No. 99–8960. Atamian *v.* Gorkin. Sup. Ct. Del. Certiorari denied. Reported below: 746 A. 2d 275.

No. 99–9010. Garcia *v.* Henry. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 382.

No. 99–9012. Fletcher *v.* North Carolina Department of Revenue et al. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 820.

No. 99–9046. Paul *v.* Department of the Navy. C. A. Fed. Cir. Certiorari denied. Reported below: 217 F. 3d 860.

No. 99–9059. Shayesteh *v.* United States Court of Appeals for the Tenth Circuit. C. A. 10th Cir. Certiorari denied.

No. 99–9066. Martin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–9082. McNeil *v.* Corcoran, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 821.

No. 99–9093. Perez-De Angel *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 207 F. 3d 658.

No. 99–9094. Romero-Cruz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 201 F. 3d 374.

No. 99–9106. Anciso *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 385.

No. 99–9109. Bollman *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 99–9125. Norfleet *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 202 F. 3d 270.

No. 99–9129. Walker *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 99–9132. Brocamonte *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 203 F. 3d 836.

No. 99–9137. GRIFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 208 F. 3d 1006.

No. 99–9138. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 189 F. 3d 483.

No. 99–9142. FORREST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 185 F. 3d 870.

No. 99–9145. GREEN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 55 Conn. App. 706, 740 A. 2d 450.

No. 99–9147. HAKOPIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 386.

No. 99–9148. GEORGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 201 F. 3d 370.

No. 99–9149. GIOVANNANGELI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9150. GEDMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 208 F. 3d 1006.

No. 99–9152. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 99–9153. DAMERVILLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 287.

No. 99–9155. HOLMES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 193 F. 3d 200.

No. 99–9156. ENIGWE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 191 F. 3d 449.

No. 99–9157. FAIRLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 99–9159. DYSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 99–9161. RASHID *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 99–9163. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 198 F. 3d 262.

No. 99–9167. Cox *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 210 F. 3d 369.

No. 99–9169. Betemit *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 99–9173. Sanchez *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 205 F. 3d 1349.

No. 99–9184. Patterson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 824.

No. 99–9189. Buckley *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 192 F. 3d 708.

No. 99–9192. Upshaw *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1327.

No. 99–9197. Pena *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1326.

No. 99–9200. Turner *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 194 F. 3d 1307.

No. 99–9203. Majors *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 196 F. 3d 1206.

No. 99–9204. Marino *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 200 F. 3d 6.

No. 99–9211. Stone *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 3d 824.

No. 99–9215. Calderon-Espinoza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 210 F. 3d 386.

No. 99–9219. Mansilla-Hernandez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 205 F. 3d 1337.

No. 99–9226. Rodriguez *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 99–9239. Jones *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 202 F. 3d 283.

No. 99–9240. Leslie *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 211 F. 3d 597.

No. 99–9241. STEVENSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1326.

No. 99–9242. GODWIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 202 F. 3d 969.

No. 99–9243. DEHANEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 205 F. 3d 1325.

No. 99–9246. GEERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9254. FULLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 197 F. 3d 271.

No. 99–9261. COLEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 99–9262. ALEXANDER *v.* FLOWERS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 208 F. 3d 225.

No. 99–9270. MCSWAIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 197 F. 3d 472.

No. 99–781. AVIS RENT A CAR SYSTEM, INC., ET AL. *v.* AGUILAR ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 21 Cal. 4th 121, 980 P. 2d 846.

JUSTICE THOMAS, dissenting.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963). The presumption is by no means rebutted here. For one, the unprecedented injunction entered by the courts below, which bars petitioner John Lawrence from uttering in the workplace any of a judicially drawn list of words deemed offensive to Latino employees, very likely suppresses fully protected speech. But even if some types of harassing speech in the workplace do not enjoy First Amendment protection, there has been no showing that a prior restraint, rather than the less severe remedy of money damages for any future violations, is necessary to regulate Lawrence's speech. Further, the injunction here is not narrowly tailored, as it applies even to isolated remarks and to remarks outside the hearing of respondents or any Latino employee. For these reasons, I respectfully dissent from the Court's denial of certiorari.

## I

Respondents, who are Latinos, were employed as drivers at petitioner Avis Rent A Car System, Inc.'s San Francisco airport facility. According to the complaint, Lawrence, another employee of the facility, routinely harassed only the Latino drivers, calling them derogatory names and demeaning them on the basis of their race, national origin, and lack of English language skills. Lawrence also appears to have engaged in uninvited touching of the Latino drivers. Respondents filed suit against Lawrence and Avis in California court under that State's Fair Employment and Housing Act (FEHA), which makes it unlawful "[f]or an employer . . . or any other person, because of race . . . [or] national origin . . . to harass an employee or applicant." Cal. Govt. Code Ann. § 12940(h) (West 1992). A jury returned special verdicts in favor of respondents, finding that Lawrence had engaged in harassment and that Avis knew or should have known of Lawrence's conduct. Respondents were each awarded $25,000 in damages, except for one who was found by the jury not to have suffered emotional distress.

The trial court then considered respondents' request for injunctive relief. Over the objection of petitioners that there was no evidence of ongoing harm such as would justify an injunction (Lawrence had not harassed anyone at work for two years), the trial court granted the requested injunction. Specifically, it ordered:

> "1. Defendant John Lawrence shall cease and desist from using any derogatory racial or ethnic epithets directed at, or descriptive of, Hispanic/Latino employees of Avis Rent A Car System, Inc., and shall further refrain from any uninvited intentional touching of said Hispanic/Latino employees, as long as he is employed by Avis Rent A Car System, Inc. in California.
>
> "2. Defendant Avis Rent A Car System, Inc. shall cease and desist from allowing defendant John Lawrence to commit any of the acts described in paragraph 1 above, under circumstances in which it knew or should have known of such acts . . . ." App. to Pet. for Cert. C2.

Lawrence and Avis appealed from the injunction portion of the judgment, claiming it is impermissibly overbroad and vague. The Court of Appeal agreed to an extent, holding that the injunction must be restricted to Lawrence's speech *in the workplace* and articulated in the form of an exemplary list of forbidden words, but upheld the injunction in all other respects.

A divided California Supreme Court affirmed. 21 Cal. 4th 121 (1999). The plurality opinion, at the outset, declined to entertain petitioners' contention that the First Amendment prohibits application of employment discrimination laws to the sort of harassing speech that creates a "hostile environment," deeming the argument waived by petitioners' decision not to challenge the jury findings of liability and damages for their past conduct. *Id.*, at 131, n. 3, 136–137, n. 5. The plurality then turned to the propriety of the injunctive remedy, accepting at face value the trial court's finding of a " 'substantial likelihood' " that Lawrence would harass again unless restrained. *Id.*, at 132. The plurality rejected petitioners' First Amendment objection, holding that the injunction is not an invalid prior restraint "because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity." *Id.*, at 138. A concurring opinion addressed the threshold question deemed waived by the plurality, concluding that, while FEHA's restrictions are content based when applied to pure speech, the First Amendment does not prohibit such application of FEHA. *Id.*, at 164, 166 (opinion of Werdegar, J.). Justices Mosk, Kennard, and Brown each filed dissenting opinions. See *id.*, at 169 (opinion of Mosk, J.); *id.*, at 176 (opinion of Kennard, J.); *id.*, at 189 (opinion of Brown, J.).

## II

I would grant certiorari to address the troubling First Amendment issues raised by this injunction. Attaching liability to the utterance of words in the workplace is likely invalid for the simple reason that this speech is fully protected speech.[1] No one claims that the words on the "exemplary list" (to be drafted by the trial court on remand) qualify as fighting words, see *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942), obscenity, see *Miller* v. *California*, 413 U. S. 15, 24 (1973), or some other category of speech currently recognized as outside the scope of First Amendment protection. Even if these words do constitute so-called "low-value speech," the content-based nature of FEHA's restriction—which bars speech based upon "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation," Cal. Govt. Code Ann. § 12940(h)(1) (West Supp. 2000) but not because of political affiliation, union membership, or numerous other traits—renders it invalid under our current jurisprudence. *R. A. V.* v. *St. Paul*, 505 U. S. 377, 391 (1992).

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[1] Like the concurring and dissenting justices below, I do not consider this argument waived by virtue of petitioners' decision not to appeal the money damages portion of the judgment. A First Amendment objection is, as a matter of logic, available against the money damages portion, the injunction portion, or both. Petitioners may well have thought their First Amendment claim weaker with respect to the money damages portion because Lawrence's past conduct consisted of speech *and* conduct (whereas the injunction prohibits pure speech independent of any conduct), cf. *NLRB* v. *Virginia Elec. & Power Co.*, 314 U. S. 469, 478 (1941), and because prior restraints

To uphold the application of a content-based antidiscrimination law such as FEHA to pure speech in the workplace, then, we would have to substantially modify our First Amendment jurisprudence. This is not to say that there are no doctrinal bases for such a modification. As the concurring opinion below pointed out, for example, we have held that public employers retain some leeway to regulate their employees' speech in the workplace, see 21 Cal. 4th, at 156 (Werdegar, J., concurring) (citing *Connick* v. *Myers*, 461 U. S. 138 (1983)), and have occasionally stated that speech may be more readily restricted when the audience is "captive" and cannot avoid the objectionable speech, see 21 Cal. 4th, at 159 (Werdegar, J., concurring) (citing *Frisby* v. *Schultz*, 487 U. S. 474 (1988)). On the other hand, these analogies may not quite translate to the instant problem. See, *e. g.*, 21 Cal. 4th, at 184–185 (Kennard, J., dissenting) (discussing captive audience doctrine); Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1821 (1992) (arguing that this Court's cases on speech in the workplace do not support a "workplace speech exception" broad enough to justify harassment law). In light of the difficulty of these issues, it is not surprising that even those commentators who conclude the First Amendment generally permits application of harassment laws to workplace speech recognize exceptions where First Amendment interests are especially strong. See, *e. g.*, Fallon, Sexual Harassment, Content Neutrality,

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are especially suspect under the First Amendment, see, *e. g.*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975).

and the First Amendment Dog that Didn't Bark, 1994 S. Ct. Rev. 1, 41, 47 (exception for speech that is reasonably designed or intended to contribute to reasoned debate on issues of public concern).

But even assuming that some pure speech in the workplace may be proscribed consistent with the First Amendment when it violates a workplace harassment law, special First Amendment problems are presented when, as here, the proscription takes the form of a prior restraint. We have, since *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), evaluated injunctions against speech as prior restraints, which entails the strictest scrutiny known to our First Amendment jurisprudence. As we have explained:

> "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975).

The instant injunction is insufficiently tailored in at least three respects, raising serious doubts concerning whether "the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 765 (1994).[2]

*First*, the injunction prohibits even a single utterance of a prohibited word. Yet a hostile environment for purposes of FEHA only arises "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (internal quotation marks and citation omitted); see 21 Cal. 4th, at 130 (plurality opinion) ("California courts have adopted the *[Harris]* standard in evaluating claims under the FEHA"). It simply cannot be known in advance whether a particular utterance will create (or recreate) a hostile environment under this standard, and speculation simply does not suffice to rebut the heavy presumption against a prior restraint. See *Southeastern Promotions, supra,* at 561; *New York Times Co.* v. *United States,* 403 U. S. 713, 725–726 (1971) (Brennan, J., concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result"). The alternative remedy of a money damages judgment for future violations would solve the problem. *Second,* there has been no showing that the prospect of a money damages judgment for future violations would fall short of deterring petitioners from recreating a hostile environment, especially when a second money damages judgment might include hefty punitive damages and attorney's fees. See 21 Cal. 4th, at 194 (Brown, J., dissenting). Indeed, it appears from the transcript of the injunction hearing held in 1994 that Lawrence had not engaged in any harassing speech or conduct since 1992. See App. to Brief in Opposition A9. *Third,* the prohibition applies without regard to whether the utterance is directed at, or within earshot of, respondents (or, for that matter, any Latino employee), and contains no exception for speech that might contribute to reasoned debate.

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[2] Although a content-neutral injunction is not treated as a prior restraint, see *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 372 (1997); *Madsen*, 512 U. S., at 763–764, n. 2, the instant injunction is indisputably content based. See 21 Cal. 4th 121, 164 (1999) (Werdegar, J., concurring); *id.*, at 172 (Mosk, J., dissenting). I apply the *Madsen* standard here because, if the injunction fails the *Madsen* standard for content-neutral injunctions, *a fortiori* it fails whatever standard applies to content-based injunctions.

My colleagues are perhaps dissuaded from granting certiorari by the paucity of lower court decisions addressing the First Amendment implications of workplace harassment law, and by the incomplete factual record in this case. Neither is a persuasive reason to deny certiorari. *First,* we must remember that we deal here with a claim at the core of the First Amendment—that the State is suppressing speech that it dislikes. For the same reason that we evaluate prior restraints under a heavy presumption against their validity (the harm from delay), we should decide the issue now. And the thorough treatment of the issues by the several opinions below makes it especially unnecessary to await a split in the lower courts. *Second,* while it is true that the record does not reveal the past speech and conduct upon which the jury based its money damages award and the trial court based its grant of injunctive relief, the record does plainly indicate the scope of the injunction and the conclusory nature of the trial court's findings as to the need for an injunction. Though the record may disable us from resolving here and now every detail of the interaction between the First Amendment and workplace harassment law, an incremental approach to this area would seem wise in any event. I respectfully dissent.

No. 99–1277. PHILIP MORRIS INC. ET AL. *v.* ENGLE ET AL. Dist. Ct. App. Fla., 3d Dist. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 746 So. 2d 457.

No. 99–1533. M. C. PRODUCTS ET AL. *v.* AT&T CORP.; and AUDIO ENTERTAINMENT NETWORK, INC., ET AL. *v.* AT&T CORP. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 205 F. 3d 1351 (first judgment) and 1350 (second judgment).

No. 99–1534. RAY ET AL. *v.* IWANSKI, PERSONAL ADMINISTRATOR OF THE ESTATE OF IWANSKI, DECEASED. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 201 F. 3d 448.

No. 99–1565. AMERICAN AIRLINES, INC. *v.* CRUZ, FOR HERSELF AND AS REPRESENTATIVE OF CRUZ AND RODRIGUEZ, MINORS, ET AL. C. A. D. C. Cir. Motion of Air Transport Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 193 F. 3d 526.

*Rehearing Denied*

No. 99–1275. SCHEIDLY *v.* TRAVELERS INSURANCE CO., *ante*, p. 1054;

No. 99–1276. GREENE *v.* DOUGLAS ET AL., *ante*, p. 1038;

No. 99–1309. CHANDLER *v.* CHANDLER ET AL., *ante*, p. 1054;

No. 99–6512. JAMES *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY, 528 U. S. 1027;

No. 99–6808. GENCO *v.* UNITED STATES ET AL., 528 U. S. 1065;

No. 99–6913. GENCO *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (two judgments), 528 U. S. 1090;

No. 99–6978. MITCHELL *v.* UNITED STATES, 528 U. S. 1056;

No. 99–7177. WARD *v.* TRENT, WARDEN, *ante,* p. 1055;

No. 99–7178. TSU ET UX. *v.* TRACY FEDERAL BANK ET AL., *ante,* p. 1023;

No. 99–7322. WATTS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 528 U. S. 1166;

No. 99–7676. LINDSEY *v.* CATOE, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., *ante,* p. 1008;

No. 99–7825. SOLIS SOSA *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante,* p. 1056;

No. 99–7860. KLUMPP *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, *ante,* p. 1039;

No. 99–7872. LINGAR *v.* LUEBBERS, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, *ante,* p. 1039;

No. 99–7982. TAYLOR *v.* CALIFORNIA, *ante,* p. 1056;

No. 99–8013. IFABIYI, AKA DEBROWN, AKA BELL, AKA BELLO *v.* UNITED STATES, *ante,* p. 1010;

No. 99–8029. KIPKIRWA *v.* SANTA CLARA COUNTY, CALIFORNIA, ET AL., *ante,* p. 1057;

No. 99–8048. ARRINGTON *v.* BROWARD COMMUNITY COLLEGE, SOUTH CAMPUS, *ante,* p. 1058;

No. 99–8072. MENDOZA ET AL. *v.* PENNINGTON ET AL., *ante,* p. 1042; and

No. 99–8644. MADDEN *v.* UNITED STATES, *ante,* p. 1079. Petitions for rehearing denied.

## MAY 23, 2000

### *Certiorari Denied*

No. 99–9269. RICHARDSON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 203 F. 3d 827.

## MAY 24, 2000

*Miscellaneous Order*

No. 99–9577 (99A950). IN RE FOSTER. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

## MAY 25, 2000

*Miscellaneous Order*

No. 99–8297 (99A956). CLAYTON *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante,* p. 1059. Motion for leave to file petition for rehearing out of time denied. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

# AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 17, 2000, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1148. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, and 526 U. S. 1169.

# LETTER OF TRANSMITTAL

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SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 17, 2000

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

## SUPREME COURT OF THE UNITED STATES

APRIL 17, 2000

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1017, 2002(a), 4003, 4004, and 5003.

[See *infra,* pp. 1151–1153.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2000, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

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*Rule 1017. Dismissal or conversion of case; suspension.*

* * * * *

(*e*) *Dismissal of an individual debtor's Chapter 7 case for substantial abuse.*—The court may dismiss an individual debtor's case for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed by the United States trustee before the time has expired, the court for cause extends the time for filing the motion to dismiss. The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

* * * * *

*Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.*

(*a*) *Twenty-day notices to parties in interest.*—Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

* * * * *

(6) a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000;

* * * * *

*Rule 4003. Exemptions.*

* * * * *

(*b*) *Objecting to a claim of exemptions.*—A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, the person filing the list, and the attorney for that person.

* * * * *

*Rule 4004. Grant or denial of discharge.*

* * * * *

(*c*) *Grant of discharge.*

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual,

(B) a complaint objecting to the discharge has been filed,

(C) the debtor has filed a waiver under § 727(a)(10),

(D) a motion to dismiss the case under Rule 1017(e) is pending,

(E) a motion to extend the time for filing a complaint objecting to discharge is pending,

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending, or

(G) the debtor has not paid in full the filing fee prescribed by 28 U. S. C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United

States under 28 U. S. C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

* * * * *

*Rule 5003. Records kept by the clerk.*

* * * * *

(*e*) *Register of mailing addresses of federal and state governmental units.*—The United States or the state or territory in which the court is located may file a statement designating its mailing address. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes these mailing addresses, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

(*f*) *Other books and records of the clerk.*—The clerk shall keep any other books and records required by the Director of the Administrative Office of the United States Courts.

# AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 17, 2000, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1156. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, and 526 U. S. 1183.

# LETTER OF TRANSMITTAL

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SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 17, 2000

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

# SUPREME COURT OF THE UNITED STATES

APRIL 17, 2000

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 4, 5, 12, 14, 26, 30, and 37 and to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims.

[See *infra*, pp. 1159–1177.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims shall take effect on December 1, 2000, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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*Rule 4. Summons.*

* * * * *

*(i) Serving the United States, its agencies, corporations, officers, or employees.*

* * * * *

(2)(A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States—whether or not the officer or employee is sued also in an official capacity—is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

. . . . .

*Rule 5. Serving and filing pleadings and other papers.*

. . . . .

(*d*) *Filing; certificate of service.*—All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

. . . . .

*Rule 12. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings.*

(*a*) *When presented.*

. . . . .

(3)(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim—or a reply to a counterclaim—within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim—or a reply to a counterclaim—within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

. . . . .

### *Rule 14. Third-party practice.*

(*a*) *When defendant may bring in third party.*—At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

. . . . .

(*c*) *Admiralty and maritime claims.*—When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

### *Rule 26. General provisions governing discovery; duty of disclosure.*

(*a*) *Required disclosures; methods to discover additional matter.*

(*1*) *Initial disclosures.*—Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures—if any—are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

* * * * *

(*3*) *Pretrial disclosures.*—In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(*4*) *Form of disclosures.*—Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

. . . . .

(*b*) *Discovery scope and limits.*—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(*1*) *In general.*—Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(*2*) *Limitations.*—By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

. . . . .

(*d*) *Timing and sequence of discovery.*—Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

. . . . .

(*f*) *Conference of parties; planning for discovery.*—Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), includ-

ing a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

. . . . .

*Rule 30. Depositions upon oral examination.*

. . . . .

*(d) Schedule and duration; motion to terminate or limit examination.*

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privi-

lege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

. . . . .

(*f*) *Certification and delivery by officer; exhibits; copies.*

(1) The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This

certificate must be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

. . . . .

*Rule 37. Failure to make disclosure or cooperate in discovery; sanctions.*

. . . . .

(c) *Failure to disclose; false or misleading disclosure; refusal to admit.*

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a

hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

. . . . .

# AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

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*Rule B. In personam actions: attachment and garnishment.*

(*1*) *When available; complaint, affidavit, judicial authorization, and process.*—In an in personam action:

(a) If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d)(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(*2*) *Notice to defendant.*—No default judgment may be entered except upon proof—which may be by affidavit—that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

. . . . .

*Rule C. In rem actions: special provisions.*

. . . . .

(*2*) *Complaint.*—In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action;

(c) in an admiralty and maritime proceeding, state that the property is within the district or will be within the district while the action is pending;

(d) in a forfeiture proceeding for violation of a federal statute, state:

(i) the place of seizure and whether it was on land or on navigable waters;

(ii) whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and

(iii) all allegations required by the statute under which the action is brought.

(*3*) *Judicial authorization and process.*

(*a*) *Arrest warrant.*

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(ii)(A) In other actions, the court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(B) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(*b*) *Service.*

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(*c*) *Deposit in court.*—If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue—in addition to the warrant—a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(*d*) *Supplemental process.*—The clerk may upon application issue supplemental process to enforce the court's order without further court order.

(*4*) *Notice.*—No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 10 days after execution, the plaintiff must promptly—or within the time that the court allows—give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U. S. C. § 31301 *et seq.*, as amended.

* * * * *

(*6*) *Responsive pleading; interrogatories.*

(*a*) *Civil forfeiture.*—In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within 20 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve an answer within 20 days after filing the statement.

(*b*) *Maritime arrests and other proceedings.*—In an in rem action not governed by Rule C(6)(a):

(i) A person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must file an answer within 20 days after filing the statement of interest or right.

(*c*) *Interrogatories.*—Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served with the answer to the complaint.

### *Rule E. Actions in rem and quasi in rem: general provisions.*

. . . . .

(*3*) *Process.*

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(b) In forfeiture cases process in rem may be served within the district or outside the district when authorized by statute.

(c) *Issuance and delivery.*—Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

. . . . .

(*7*) *Security on counterclaim.*

(a) When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

(*8*) *Restricted appearance.*—An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(*9*) *Disposition of property; sales.*

* * * * *

(*b*) *Interlocutory sales; delivery.*

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold—with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court—if:

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing release of the property.

(ii) In the circumstances described in Rule E(9)(b)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

* * * * *

(*10*) *Preservation of property.*—When the owner or another person remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on a party's motion or on its own, may enter any order necessary to preserve the property and to prevent its removal.

# AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 17, 2000, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post,* p. 1180. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, and 526 U. S. 1189.

# LETTER OF TRANSMITTAL

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SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 17, 2000

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

# SUPREME COURT OF THE UNITED STATES

APRIL 17, 2000

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 7, 31, 32, and 38, and new Rule 32.2.

[See *infra,* pp. 1183–1187.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2000, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

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*Rule 7. The indictment and the information.*

* * * * *

(*c*) *Nature and contents.*

* * * * *

(*2*) *Criminal forfeiture.*—No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

* * * * *

*Rule 31. Verdict.*

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[(*e*) *Criminal forfeiture.*] *(Abrogated.)*

*Rule 32. Sentence and judgment.*

* * * * *

(*d*) *Judgment.*

* * * * *

(*2*) *Criminal forfeiture.*—Forfeiture procedures are governed by Rule 32.2.

* * * * *

*Rule 32.2. Criminal forfeiture.*

(*a*) *Notice to the defendant.*—A court shall not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.

(*b*) *Entry of preliminary order of forfeiture; post verdict hearing.*

(1) As soon as practicable after entering a guilty verdict or accepting a plea of guilty or *nolo contendere* on any count in an indictment or information with regard to which criminal forfeiture is sought, the court shall determine what property is subject to forfeiture under the applicable statute. If forfeiture of specific property is sought, the court shall determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment against the defendant, the court shall determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest shall be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and shall be made a part of the sentence and included in the judgment. The court may include in the order of forfeiture

conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(c) *Ancillary proceeding; final order of forfeiture.*

(1) If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court shall conduct an ancillary proceeding but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

(2) When the ancillary proceeding ends, the court shall enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely claim, the preliminary order becomes the final order of forfeiture, if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order of forfeiture on the ground that the property

belongs, in whole or in part, to a codefendant or third party, nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions, unless the court determines that there is no just reason for delay.

(4) An ancillary proceeding is not part of sentencing.

(*d*) *Stay pending appeal.*—If a defendant appeals from a conviction or order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(*e*) *Subsequently located property; substitute property.*

(1) On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court shall:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) There is no right to trial by jury under Rule 32.2(e).

*Rule 38. Stay of execution.*

. . . . .

(*e*) *Notice to victims and restitution.*—A sanction imposed as part of the sentence pursuant to 18 U. S. C. §§ 3555 or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

. . . . .

# AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 17, 2000, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1190. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, and 523 U. S. 1235.

# LETTER OF TRANSMITTAL

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SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 17, 2000

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

# SUPREME COURT OF THE UNITED STATES

APRIL 17, 2000

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 103, 404, 701, 702, 703, 803(6), and 902.

[See *infra*, pp. 1193–1197.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2000, and shall govern all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

*Rule 103. Rulings on evidence.*

(*a*) *Effect of erroneous ruling.*—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

> (*1*) *Objection.*—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (*2*) *Offer of proof.*—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(*b*) *Record of offer and ruling.*—The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(*c*) *Hearing of jury.*—In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(*d*) *Plain error.*—Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

### *Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.*

(*a*) *Character evidence generally.*—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

> (*1*) *Character of accused.*—Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
>
> (*2*) *Character of alleged victim.*—Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
>
> (*3*) *Character of witness.*—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(*b*) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

### *Rule 701. Opinion testimony by lay witnesses.*

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

### *Rule 702. Testimony by experts.*

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

### *Rule 703. Bases of opinion testimony by experts.*

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

### *Rule 803. Hearsay exceptions; availability of declarant immaterial.*

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . . .

(*6*) *Records of regularly conducted activity.*—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * * * *

*Rule 902. Self-authentication.*

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * * * *

(*11*) *Certified domestic records of regularly conducted activity.*—The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(*12*) *Certified foreign records of regularly conducted activity.*—In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

# BUILDING REGULATIONS OF THE SUPREME COURT OF THE UNITED STATES

The following is a compilation of the six Regulations currently in effect, issued pursuant to 40 U. S. C. § 13*l*, that govern the building and grounds of the Supreme Court of the United States. These Regulations were prescribed by the Marshal of the Supreme Court and approved by the Chief Justice of the United States as of the effective date noted on each Regulation.

# BUILDING REGULATIONS OF THE SUPREME COURT OF THE UNITED STATES

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## REGULATION 100–1

***September 29, 1994***

Subject: Public hours of the United States Supreme Court.

1. PURPOSE:

To prescribe hours that the Supreme Court building is open to the public.

2. AUTHORITY:

Subject to the approval of the Chief Justice, the Marshal may promulgate regulations as provided for under 63 Stat. 617, as amended, 40 U. S. C. § 13*l*.

3. POLICY:

The Supreme Court building at 1 First Street, N. E., Washington, D. C. 20543 is open to the public Monday through Friday, from 9:00 a.m. to 4:30 p.m., except on federal holidays. The building is closed at all other times, although persons having legitimate business may be admitted at other times when so authorized by responsible officials.

### *October 4, 1994*

## NOTICE

Pursuant to the authority and responsibilities of the Marshal of the Supreme Court of the United States as set forth in 40 U. S. C. § 13*l*, and with the approval of the Chief Justice of the United States, the following Regulation, entitled Regulation Two, is hereby prescribed. The Regulation and copies of this notice shall be posted in the Supreme Court building and made available for public inspection.

## REGULATION TWO

In order to protect the Supreme Court building and grounds, to protect the persons and property therein, or to maintain suitable order and decorum, the Marshal of the Supreme Court, pursuant to his responsibilities outlined in 40 U. S. C. § 13*l*, may, at any time, declare the Supreme Court building and grounds, or any portion thereof, closed to the general public. Any person who, having been informed of the closure of the building or grounds or portion of the building or grounds, enters the closed areas without the authorization of the Marshal or refuses to leave the closed area after being requested to do so shall be subject to arrest and subject to penalties set forth in 40 U. S. C. § 13m.

### *September 23, 1994*

## NOTICE

Pursuant to the authority and responsibility of the Marshal of the Supreme Court of the United States as set out in 40 U. S. C. § 13*l*, and with the approval of the Chief Justice of the United States, the following Regulation, entitled Regulation Three, is hereby prescribed. The Regulation and copies of this notice shall be posted in the Supreme Court building and made available for public inspection.

## REGULATION THREE

(A) Except as authorized by the Marshal, it shall be unlawful for any person, within the Supreme Court building or upon the Supreme Court grounds, to carry or have readily available to the person, any:

(1) "firearm," as that term is defined in Title 18 U. S. C. § 921(3);

(2) "explosive or incendiary device," as those terms are defined by 18 U. S. C. § 844(j) and 18 U. S. C. § 232(5); or

(3) "dangerous weapon," as that term is defined in 40 U. S. C. § 193m(3), or District of Columbia Code §§ 9–128(3) and 22–3214.

(B) Officers of the Supreme Court Police shall also have the authority to deny entry to, or to expel from, the Supreme Court building or grounds any person who is carrying or has readily available any object, article, or other item which may pose a danger to Court property or the safety of the Justices, Court employees, guests, or the general public.

(C) This Regulation is promulgated pursuant to 40 U. S. C. §§ 13n and 13*l*, and any person failing to comply with this Regulation shall be prosecuted under 40 U. S. C. § 13m.

## REGULATION FOUR

### *November 12, 1999*

This Regulation is issued under authority of 40 U. S. C. § 13*l* for the protection of the Supreme Court building and grounds and persons and property therein, and for the maintenance of suitable order and decorum of the Court, and enforces the provisions of 40 U. S. C. §§ 13g and 13i. Any person who fails to comply with this Regulation may be subject to a fine and/or imprisonment pursuant to 40 U. S. C. § 13m.

No person who owns or has custody of a dog (hereinafter "Owner") shall permit the dog to be on Supreme Court grounds unless the dog is secured by a leash that does not exceed four feet in length.

Owners shall control their dogs and prevent their dogs from harassing or injuring any person on Supreme Court grounds or injuring any statue, seat, wall, fountain or any erection or architectural feature, or tree, shrub, plant or turf on Supreme Court grounds.

Any owner who permits his or her dog to defecate on Supreme Court grounds shall immediately remove the excrement.

No owner shall permit his or her dog to enter the Supreme Court building, unless the owner is disabled and the dog is trained to assist the owner or the owner is a law enforcement officer and the dog is trained and authorized to assist the law enforcement officer.

## REGULATION FIVE

*April 24, 2000*

This Regulation is issued under authority of 40 U. S. C. § 13*l* to protect the Supreme Court building, grounds, and persons and property therein, and to maintain suitable order and decorum within the Supreme Court building and grounds. The Regulation enforces provisions of 40 U. S. C. § 13j. Any person who fails to comply with this Regulation may be subject to a fine and/or imprisonment pursuant to 40 U. S. C. § 13m.

No person shall, on the Supreme Court grounds, create any noise disturbance. For purposes of this Regulation, a noise disturbance is any sound that (1) falls within the definition of "noise disturbance" set forth in 20 D. C. M. R. 20–27–2799; or (2) disturbs or tends to disturb the order and decorum of the Supreme Court or any activities authorized by the Court in the Supreme Court building or on the Supreme Court grounds.

## REGULATION SIX

*April 25, 2000*

This Regulation is issued under authority of 40 U. S. C. § 13*l* to protect the Supreme Court building and grounds, and persons and property thereon, and to maintain suitable order and decorum within the Supreme Court building and grounds. Any person who fails to comply with this Regulation may be subject to a fine and/or imprisonment pursuant to 40 U. S. C. § 13m.

The use of signs on the perimeter sidewalks on the Supreme Court grounds is regulated as follows:

1. No signs shall be allowed except those made of cardboard, posterboard, or cloth.

2. Supports for signs must be entirely made of wood, have dull ends, may not be hollow, and may not exceed ¾ inch at their largest point. There shall be no nails, screws, or bolt-type fastening devices protruding from the wooden supports.

3. Hand-carried signs are allowed regardless of size.

4. Signs that are not hand-carried are allowed only if they are

> (a) no larger than 4 feet in length, 4 feet in width, and ¼ inch in thickness (exclusive of braces that are reasonably required to meet support and safety requirements, as set forth in section 2 above), and not elevated so as to exceed a height of 6 feet above the ground at their highest point;
>
> (b) not used so as to form an enclosure of two or more sides;
>
> (c) attended at all times (attended means that an individual must remain within 3 feet of each sign); and
>
> (d) not arranged in such manner as to create a single sign that exceeds the size limitations in subsection (a).

5. No individual may have more than two non-hand-carried signs at any one time.

Notwithstanding the above, no person shall carry or place any sign in such a manner as to impede pedestrian traffic, access to and from the Supreme Court plaza or building, or to cause any safety or security hazard to any person.

THE INDEX AND/OR TABLE OF CONTENTS HAS
BEEN REMOVED AND PHOTOGRAPHED
SEPARATELY WITHIN THIS VOLUME YEAR.

FOR ROLL FILM USERS, THIS INFORMATION FOR THE
CURRENT VOLUME YEAR IS AT THE BEGINNING
OF THE MICROFILM. FOR A PRIOR YEAR VOLUME,
THIS INFORMATION IS AT THE END OF THE
MICROFILM.

FOR MICROFICHE USERS, THE INDEX AND/OR
CONTENTS IS CONTAINED ON A SEPARATE FICHE.